

No. 11089

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

JAMES HENRY PACKING COMPANY, a Cor-
poration,

Appellee.

JAMES HENRY PACKING COMPANY, a Cor-
poration,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

OCT 16 1945

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified
Transcript of Record.

United States District Court for the Western District of Washington, Northern Division.

Civil Action—No. 884

CHESTER BOWLES, Administrator of the Office of Price Administration on behalf of the United States of America,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY,

Defendant.

COMPLAINT

Count I.

1. Plaintiff, as Administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 2005 (e) of the Emergency Price Control Act of 1942 (Pub. Laws 421), 77th Con. 2nd Session 56 Stat. 23,) enacted January 30, 1942, hereinafter called "the Act".

2. Jurisdiction of this Act is conferred on this Court by Section 205 (c) of the Act and by said Section 205 (e) of the Act.

3. At all times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, as amended (9 F. B. 1121), establishing a maximum price for the commodities enumerated in the title thereof.

4. At all times hereinafter mentioned, James

Henry Packing Company was a corporation engaged in business of selling beef and veal carcasses and wholesale cuts, as those terms are defined in the said Maximum Price Regulation No. 169, as amended, and the transactions hereinafter related took place within the jurisdiction of this court.

5. Notwithstanding the provisions of the said Maximum Price Regulation No. 169, as amended, the said James Henry Packing Company did, between the 8th day of July, 1943, and the 8th day of November, 1943, sell and deliver beef and veal carcasses and wholesale cuts to many purchasers, and receive payment therefor at prices in excess of the maximum legal prices fixed in the applicable Maximum Price Regulation; that the amount charged and received from each of said purchasers by the said James Henry Packing Company in excess of the maximum legal price, and the date of the receipt of the said excess, are shown in plaintiff's Exhibit A, attached hereto and by this reference made a part hereof as though fully set forth herein. The said purchasers who purchased the said beef and veal carcasses and wholesale cuts did so in the course of trade and business.

6. Treble the amount by which the considerations received in the said sales referred to in paragraph 5 above exceeded the applicable maximum prices, as established by the said Maximum Price Regulation No. 169 as amended, is the sum of \$57,448.92.

Wherefore, plaintiff demands judgment on behalf of the United States against James Henry Packing Company in the sum of \$57,448.92 and costs.

ROBERT C. FINLEY

District Enforcement Attorney

A. V. STONEMAN

Litigation Attorney [3]

STATEMENT OF PAYMENE REGULATION 169
AS AMENDED RECIEF AND VEAL
CARCASS

JAMES HENRY PACKING COMPANY
Seattle, Washington

Sheet 1 of 9

STATEMENT OF PAYMENTS IN EXCESS OF MAXIMUM LEGAL PRICES FIXED IN MAXIMUM PRICE REGULATION 169
AS AMENDED RECEIVED BY JAMES HENRY PACKING COMPANY FROM PURCHASERS OF BEEF AND VEAL
CARCASSES AND WHOLESALE CUTS FOR THE PERIOD ENDING NOVEMBER 8, 1943

Account Number	Lessor Val Sonntag	Date	Payments by Months During 1943					Total		
			July	August	September	October	November			
1		July 14	\$ 57.93							
		22	49.83							
		29	47.07							
		August 5		\$ 47.95						
		13		45.14						
		23		41.17						
		30		46.17						
		September 3			\$ 45.87					
		10			45.21					
		17			41.26					
		24			42.72					
		October 1				\$ 33.55				
		5				31.69				
		15				31.82				
		22				33.28				
		29				32.91				
		November 8					\$ 33.33			
					\$ 154.83	\$ 383.43	\$ 175.06	\$ 163.25	\$ 33.33	
					\$ 12.03					
		2	William Myers	July 20	\$ 16.86					
				27		\$ 17.95				
				August 3		15.83				
10				14.07						
17				16.26						
24				14.76						
September 8					\$ 15.68					
14					15.46					
21					15.40					
28					11.48					
October 5						\$ 11.00				
12						10.35				
19						8.62				
26						9.60				
November 2							\$ 10.73			
					\$ 28.89	\$ 78.87	\$ 58.02	\$ 39.57	\$ 10.73	
					\$ 37.74					
3	R. T. Anderson			July 13	\$ 37.74					
				19	56.46					
				26	64.05					
				August 2		\$ 66.55				
				9		62.80				
		16		65.10						
		23		64.05						
		30		64.65						
		September 13			\$ 71.25					
		13			56.80					
		20			67.35					
		28			45.43					
		October 4				\$ 47.43				
		18				39.20				
		18				36.54				
		November 1					\$ 37.80			
					\$ 158.25	\$ 223.15	\$ 240.83	\$ 123.17	\$ 88.30	
					\$ 65.11					
		4	S. L. Carstensen	July 13	\$ 65.11					
				20	104.03					
				27	98.95					
				August 3		\$ 108.12				
10				81.00						
17				83.83						
24				86.43						
31				84.82						
September 8					\$ 96.57					
14					80.67					
21					82.80					
28					62.30					
October 5						\$ 65.59				
12						53.76				
19						58.73				
26						54.04				
November 2							\$ 63.42			
					\$ 271.09	\$ 444.30	\$ 322.34	\$ 232.12	\$ 63.42	
					\$ 123.17	\$ 240.83	\$ 123.17	\$ 88.30	\$ 933.70	
					\$ 50.50				\$ 37.80	
					\$ 216.08				\$ 216.08	
					\$ 81.00				\$ 81.00	
			\$ 1,333.27				\$ 1,333.27			

Exhibit "A",—(Continued)

Account Number	Lessor	Date	Payments by Months During 1943					Total
			July	August	September	October	November	
5	Gay R. Wilmont	July 14	\$ 41.16					
		21	55.52					
		28	53.23					
		August 4		\$ 59.32				
		11		55.82				
		18		55.76				
		26		55.98				
		September 1			61.70			
		8			59.78			
		15			54.50			
22			55.64					
29			37.91					
October 6				\$ 43.03				
13				37.90				
20				30.27				
27				36.69				
November 3					\$ 37.99			
			\$ 149.91	\$ 225.88	\$ 269.53	\$ 147.89	\$ 37.99	\$ 892.20
6	Lindquist & Brown	July 13	\$ 45.68					
		19	80.03					
		26	93.80					
		August 2		\$ 102.29				
		9		92.74				
		16		89.73				
		23		97.53				
		30		92.74				
		September 7			\$ 99.18			
		13			81.00			
20			48.40					
27			43.50					
October 4				\$ 48.17				
11				40.46				
18				44.00				
25				44.00				
November 3					\$ 44.00			
			\$ 219.51	\$ 475.03	\$ 269.68	\$ 176.63	\$ 44.00	\$ 1,184.85
7	Thomas Muhlolland	July 14	\$ 19.02					
		21	20.67					
		28	15.46					
		August 4		\$ 19.85				
		11		16.75				
		18		16.66				
		26		18.38				
		September 1			\$ 15.93			
		8			14.26			
		15			13.80			
22			12.23					
29			8.18					
October 6				\$ 11.17				
13				8.69				
20				8.68				
27				8.88				
November 3					\$ 9.86			
			\$ 55.15	\$ 71.64	\$ 64.40	\$ 37.42	\$ 9.86	\$ 238.47
8	Howard's Market	July 13	\$ 54.55					
		20	63.33					
		27	67.11					
		August 3		\$ 77.44				
		10		66.20				
		17		55.72				
		24		62.46				
		31		66.00				
		September 7			\$ 79.17			
		14			61.58			
21			57.16					
28			47.17					
October 5				\$ 48.65				
12				48.83				
19				43.35				
26				47.05				
November 2					\$ 40.00			
			\$ 189.99	\$ 327.82	\$ 245.08	\$ 187.88	\$ 40.00	\$ 990.77

Exhibit "A"-(Continued)

Account Number	Lessor Name	Payments by Months During 1943					Total	
		July	August	September	October	November		
10	Paul Snyder	July 13	\$ 79.03					
		July 20	80.51					
		July 27	85.53					
		August 3		\$ 93.68				
		August 10		87.20				
		August 17		86.28				
		August 24		87.18				
		August 31		94.12				
		September 8			\$ 90.70			
		September 14			79.95			
October 5			59.66					
October 12			94.24	\$ 69.08				
October 19				61.83				
October 26				64.81				
November 2				62.87				
			\$ 254.07	\$ 448.46	\$ 324.55	\$ 258.59	\$ 70.17	\$ 1,355.84
11	John R. Marti	July 12	\$ 28.78					
		July 19	42.29					
		July 26	43.04					
		August 2		\$ 67.37				
		August 9		41.36				
		August 16		40.90				
		August 23		42.22				
		August 30		41.71				
		September 6		43.39				
		September 13						
		\$ 184.53	\$ 115.72				\$ 300.25	
12	Becker Brothers	July 13	\$ 101.03					
		July 20	125.38					
		July 27	129.46					
		August 3		\$ 136.64				
		August 10		124.85				
		August 17		121.84				
		August 24		125.07				
		August 31		115.81				
		September 7			\$ 123.03			
		September 14			108.84			
September 21			108.46					
September 28			79.41					
October 5				\$ 80.10				
October 12				72.06				
October 19				87.35				
November 2					\$ 98.55			
			\$ 355.87	\$ 624.21	\$ 419.77	\$ 239.51	\$ 98.55	\$ 1,737.91
13	Frank Blunden	July 12	\$ 45.82					
		July 19	40.43					
		July 26	41.65					
		August 2		\$ 33.50				
		August 9		41.86				
		August 16		49.74				
		August 23		45.62				
		August 30		45.52				
		September 6			\$ 52.66			
		September 13			46.31			
September 20			50.35					
September 27			30.82					
October 4				\$ 35.37				
October 11				28.93				
October 18				30.98				
October 25				30.46				
			\$ 127.90	\$ 216.24	\$ 180.14	\$ 125.74		\$ 650.02

Exhibit "A"-(Continued)

Account Number	Lessor Oscar Eitem	Date	Payments by Months During 1943				Total			
			July	August	September	October		November		
19		July 14	\$ 55.00							
		July 27	84.92							
		August 3	104.78							
		August 11		\$ 71.97						
		August 17		83.29						
		August 21		59.86						
		August 27		18.36						
		September 8			\$ 91.07					
		September 13			18.31					
		October 20			17.61	\$ 82.82				
		November 2				25.64	\$ 6.60			
			\$ 254.70	\$ 233.48	\$ 126.99	\$ 108.46	\$ 6.60	\$ 730.23		
20	Thomas E. Stockley	July 10	\$ 65.00							
		July 23	88.90							
		July 30	83.60							
		August 6		\$ 82.40						
		August 13		79.45						
		August 19		69.80						
		August 27		62.40						
		Sept. 10			\$ 123.30					
					\$ 297.50	\$ 294.05	\$ 123.30			\$ 654.85
		21	Warren Meyer	July 19	\$ 25.72					
				July 26	48.28					
August 2				\$ 50.70						
August 9				47.29						
August 16				48.40						
August 23				49.08						
August 30				54.74						
September 7					\$ 56.22					
September 13					45.44					
September 20					50.22					
September 28					36.30					
October 4				\$ 42.77						
October 11				33.73						
October 18				37.22						
October 25				35.53						
November 1					\$ 42.52					
			\$ 74.00	\$ 250.21	\$ 188.18	\$ 149.25	\$ 42.52	\$ 704.16		
22	A. C. Marr	July 30	\$ 14.73							
		July 27	40.90							
		August 6		\$ 43.77						
		August 10		39.04						
		August 17		37.31						
		August 24		41.00						
		September 3			\$ 43.80					
		September 7			47.51					
		September 14			38.94					
		September 21			42.35					
		September 28			29.71					
October 5				\$ 31.23						
October 12				28.71						
October 19				29.20						
October 26				28.00						
November 2					\$ 30.91					
			\$ 55.63	\$ 161.12	\$ 202.31	\$ 117.14	\$ 30.91	\$ 567.11		

Exhibit "A"-(Continued)

Account Number	Lessor	Date	Payments by Months During 1943					Total
			July	August	September	October	November	
23	William Vodaraki	July 27	\$ 87.50	\$ 75.96				
		August 3		\$ 67.28				
		10		32.11				
		17		64.61				
		24			\$ 46.59			
		September 8			51.32			
		14			42.10			
		21			50.79			
		28			42.92		\$ 31.63	
		October 5					23.45	
20					33.87			
26					29.24			
November 2						\$ 36.23		
			\$ 87.50	\$ 239.96	\$ 233.72	\$ 118.19	\$ 36.23	\$ 715.60
24	Tom Miranti	July 26	\$ 64.42	\$ 98.16				
		August 2		76.69				
		9		77.04				
		16		88.58				
		23		81.11				
		30			\$ 95.30			
		September 7			76.79			
		13			91.88			
		20			80.33			
		27					\$ 38.34	
October 4					53.85			
11					52.76			
18					51.39			
25						\$ 65.30		
November 1						\$ 196.34	\$ 65.30	\$ 1,092.94
			\$ 64.42	\$ 422.58	\$ 344.30	\$ 196.34	\$ 65.30	\$ 1,092.94
25	Richard Hartwig	July 26	\$ 36.63					
		August 2		\$ 79.69				
		9		83.60				
		16		77.16				
		23		79.17				
		30		80.35				
		September 7			\$ 84.61			
		13			77.63			
		20			79.70			
		27			81.51			
October 4					\$ 32.79			
11					55.60			
18					57.11			
25					57.17			
November 1						\$ 55.64		
			\$ 36.63	\$ 399.97	\$ 223.45	\$ 202.67	\$ 55.64	\$ 1,018.36
			\$ 37,770.98	\$ 6,783.19	\$ 4,959.14	\$ 2,851.47	\$ 774.86	\$ 19,149.64

Total by Months for Period

[Endorsed]: Filed Feb. 29, 1944.

[Title of District Court and Cause.]

AMENDED ANSWER

1. Defendant admits the allegations of Paragraphs 1, 2 and 3 of Count I. of plaintiff's complaint.

2. Defendant admits the allegations of Paragraph 4 of Count I. of plaintiff's complaint, except that it denies that it was at the times therein mentioned engaged in the business of selling veal carcasses, and wholesale cuts thereof, and denies that the transactions in said paragraph referred to took place.

3. Defendant denies each and every allegation of Paragraph 5 of Count I. of plaintiff's said complaint.

4. Defendant denies the allegation of Paragraph 6 of Count I. of plaintiff's said complaint.

AFFIRMATIVE DEFENSES

1. Defendant alleges that the individuals named as lessors in Sheets 1 to 9, both inclusive, of Exhibit 'A,' attached to and made a part of plaintiff's said complaint, were each employees of the defendant during the times shown respectively in said Exhibit 'A' and that during said times the defendant sold no beef or veal to any of said individuals.

2. Defendant alleges that this action was brought under Section 205 (e) of the Emergency Price Control Act of 1942 in the name of Chester Bowles, Administrator of the Office of Price Administration, but not by said Administrator, and said

action was instituted without authority from said Administrator, and said Administrator has no right or discretion under the provisions of said Emergency Price Control Act of 1942, or any other law, to delegate his authority to bring such an action, nor did said Administrator attempt to delegate such authority to the persons who instituted said action, and the act of the [15] persons who instituted said action was without authorization in law or in fact.

Wherefore, defendant demands that the above entitled action be dismissed, and that it recover its costs.

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant.

Copy reed. Oct. 31, 1944.

C. E. HUGHES
Atty. for Plff.

[Endorsed]: Filed Nov. 14, 1944. [16]

[Title of District Court and Cause.]

STIPULATION

To reduce to the minimum the number of witnesses required for the trial of the above entitled action, the parties hereto stipulate as follows:

1. That paragraphs I., II. and III. of plaintiff's complaint are hereby admitted.

2. That James Henry Packing Company, defendant above named, is now, and was at all times mentioned in plaintiff's complaint, a corporation, engaged in the slaughter house and meat packing business at Seattle, Washington, selling at wholesale, meats and meat products, including beef, lamb, pork and wholesale cuts thereof to retail meat dealers at or near Seattle.

3. That during July 1943 said defendant executed with and delivered to each of 25 individuals hereinafter named two written instruments, one denominated 'Lease,' and the other denominated 'Contract of Employment.' A copy of the form of said instrument denominated 'Lease' is hereto attached and marked Exhibit 'A,' and made a part hereof; and a copy of the form of said instrument denominated 'Contract of Employment' is hereto attached and marked Exhibit 'B,' and made a part hereof. Said Exhibit 'A,' 25 in [17] number, are all identical except as to date, name, address and amount payable monthly. Said Exhibit 'B,' 25 in number, are all identical except as to date, name and address.

4. That at the time of, and for sometimes prior to, the execution of said Exhibits 'A' and 'B,' said individuals hereafter named owned and operated retail meat markets in and near Seattle, Washington, selling at retail, meats, consisting principally of beef, veal, pork, lamb and wholesale cuts thereof; also poultry and fish, and, in some instances, butter, eggs, cheese, fruit and vegetables;

and during said period said individuals bought from said defendant for their retail trade, beef, pork and lamb, and wholesale cuts thereof, and also ham, bacon and lard.

5. That at the time of the execution of said Exhibits 'A' and 'B,' and for sometime prior thereto, there was a scarcity of processed meats and meat products in and around Seattle, and retail meat markets generally were able to secure but small quantities thereof, and were, therefore, unable to adequately supply their trade, and, as a result, many retail meats markets suspended business.

6. That after the execution, and during the life, of Exhibits 'A' and 'B,' defendant delivered beef, lamb and pork, in wholesale cuts, and ham, bacon and lard, to said 25 markets for sale at retail, together with invoices covering each delivery showing the name of the individual retail market, the quantity in pounds of meat delivered and the wholesale price per pound with total price of each.

7. That each of the 25 individual markets hereafter named paid defendant for all meats delivered to said markets by the defendant between July 1st and November 8, 1943, during the life of said Exhibits 'A' and 'B,' the maximum price as fixed by Maximum Price Regulation No. 169, as amended; and, in addition thereto, [18] defendant received from said 25 markets during the life of said Exhibits 'A' and 'B' the sum of \$19,149.64; said sum being a percentage of gross business of said 25 markets as provided in said Exhibit 'B.' An itemized statement of said payments is attached

to plaintiff's complaint, and marked Exhibit 'A' therein and is made a part hereof.

8. That the following is an itemized statement showing the names of the 25 individuals who signed Exhibits 'A' and 'B,' the dates of execution thereof and the amount of the monthly payment provided in Exhibit 'A.'

Name	Date of Exhibits 'A' and 'B'	Monthly Payments Pro- vided in Ex. 'A'
1. Val Sontag	July 1, 1943	\$30.00
2. Mary Klontz	July 2, 1943	30.00
3. Paul Snyder	July 2, 1943	35.00
4. Ray Parmenter	July 2, 1943	30.00
5. Becker Bros.	July 5, 1943	35.00
6. Lindquist & Brown	July 6, 1943	30.00
7. Frank Blunden	July 6, 1943	35.00
8. Thomas Mulholland	July 6, 1943	30.00
9. S. L. Carstensen	July 6, 1943	35.00
10. R. T. Anderson	July 6, 1943	25.00
11. Thomas E. Stockley	July 7, 1943	25.00
12. J. G. Paar	July 7, 1943	20.00
13. Frank E. Mangan	July 7, 1943	25.00
14. Howard Bosanko	July 7, 1943	30.00
15. Hans Thompson	July 7, 1943	25.00
16. Oscar Etten	July 7, 1943	25.00
17. Guy R. Wilmot	July 7, 1943	30.00
18. John R. Marti	July 7, 1943	20.00
19. Bungalow Grocery & Market	July 8, 1943	20.00
20. William Myers	July 14, 1943	25.00
21. Warren Meyer	July 16, 1943	25.00
22. Alfred C. Mar	July 16, 1943	20.00
23. Vodarski & Sparling	July 19, 1943	30.00
24. Tom Mirante	July 20, 1943	20.00
25. Richard F. Hartwig	July 22, 1943	35.00

9 That the leases from John R. Marti and Bungalow Grocery & Market were cancelled in August 1943 by mutual agreement, and all other

of said markets were operated under Exhibits 'A' and 'B' from their respective dates until on or about November 1, 1943, on which date defendant requested of each of said individuals that said exhibits be mutually rescinded as of that date; and defendant [19] thereafter treated said exhibits as cancelled as of that date and thereafter defendant received no benefits therefrom.

10. That said 25 individuals were unable to obtain from defendant an adequate supply of beef, pork, lamb and wholesale cuts thereof prior to the execution of said Exhibits 'A' and 'B.' That after the execution, and during the life, of said Exhibits 'A' and 'B,' said 25 markets received from defendant a much greater supply of said commodities.

11. Materiality of facts herein stipulated is not admitted by either party and either party may introduce evidence or additional facts not inconsistent with this stipulation.

Dated at Seattle, Washington, this 11th day of October, 1944.

GEORGE H. LAYMAN

C. E. HUGHES

Attorneys for Plaintiff

AMOS RAY SMITH

HENRY CLAY AGNEW

Attorneys for Defendant [20]

EXHIBIT 'A'

LEASE

This Lease made this.....day of July 1943 between, as lessor, and James Henry Packing Co., a corporation, as lessee; Witnesseth:

That the said lessor does by these presents lease and demise unto the said lessee, and the said lessee does hereby hire and take from the lessor those certain premises, property, and business located in the City of Seattle, King County, State of Washington, and described as follows:

The meat market of the lessor at number, in the City of Seattle, Washington, including the leasehold interest of the lessor, and all furniture, fixtures, and equipment for the term of one (1) year from theday of....., 1943, to theday of....., 1944.

The rental to be paid to the lessor by the lessee shall be the sum of.....Dollars per month, payable monthly, and it is hereby agreed that if any rent shall be due and unpaid for a period of ten (10) days following any month of occupancy, then it shall be lawful for the lessor to reenter said premises and remove all persons therefrom, and the lessee does hereby covenant and agree to pay the lessor the said rent in the manner hereinbefore specified, and not to assign this lease, nor to sublet all or any part of the leased premises

without the written consent of the lessor; and it is mutually agreed that the interest of the lessee may not be transferred by operation of law through any execution sale, or bankruptcy or insolvency proceeding, and, at the expiration of said term, the lessee shall quit and surrender the premises in as good state and condition as reasonable use and wear will permit, unavoidable damage excepted.

It is further agreed that said meat market may, at the election of the lessee, be operated under its present name.

Executed in Duplicate by the lessor and the lessee the day and year herein first above written.

.....

Lessor

JAMES HENRY PACKING CO.,

Lessee

By.....

President

State of Washington

County of King—ss.

On this.....day of....., 1943, before me, the undersigned, a notary public in and for the State of Washington, personally appeared, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged said instrument to be his free and voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto signed my name and affixed my notarial seal the day and year in this certificate first above written.

.....

Notary Public in and for the State of Washington, residing at Seattle [22]

EXHIBIT 'B'

CONTRACT OF EMPLOYMENT

This Agreement Made this.....day of, 1943, by and between James Henry Packing Co., a corporation, as first party, and, as second party; Witnesseth:

Whereas, first party is the lessee of the meat market at number....., Seattle, Washington, and second party desires to enter the service of first party as the manager of said meat market;

Now, Therefore, It is mutually Agreed as follows:

1. First party hereby hires second party, and second party hereby agrees to work for first party, as the manager of the meat market above referred to for the term of one year from the date hereof.

2. That during the term of this agreement second party shall:

(a) Manage, direct, and superintend the business of said meat market to the best of his ability, subject at all times to the direction, instructions, and control of first party.

(b) Keep such books, and accounts, and records as may be prescribed from time to time by first party, and correctly enter therein any

and all moneys received, as well as all merchandise received or sold, from said premises, and, at weekly intervals, duly account to first party for all moneys received by him in the operation of the business of said meat market.

3. That during the term of his employment, second party shall properly manage said meat market, and for his services first party [23] shall pay to second party all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and ten per cent (10%) of gross sales.

4. Second party agrees to incur no obligations or liabilities whatever without prior authorization therefor from first party.

Executed in Duplicate the day and year herein first above written.

JAMES HENRY PACKING CO.,
First Party

By.....
President

.....
Second Party

[Endorsed]: Filed Dec. 11, 1944. [24]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

Supplementing the stipulation herein dated October 11, 1944, it is hereby further Stipulated and Agreed as follows:

1. That eight of said 25 individuals, at all times during the year 1943, owned their said markets and the premises in which the markets were located; and the remaining 17 individuals owned their respective markets, but rented the premises in which the markets were located, and, to the knowledge of defendant, no specific permission was obtained from the owners of such leased premises to execute Exhibit 'A'; nor were said owners of leased premises notified of the execution of Exhibit 'A.'

2. Invoices of meats delivered to said 25 markets subsequent to the execution of Exhibits 'A' and 'B,' by defendant, were rendered in the same manner and form as before the execution of said Exhibits.

3. That during the life of said Exhibits 'A' and 'B,' the receipts by defendant from beef delivered to said markets averaged 57% of all meats delivered to said markets; and, while no records were kept by said markets of the percentage of beef to total sales [25] at retail, it was estimated and agreed by and between said individuals and the defendant that beef sales by said retail markets approximated 30% of total sales except in the cases of Lindquist and Brown, who estimated their beef sales at 50% of said total, and Frank Blunden, who estimated his sales at 40% of said total; and, beginning with

the month of September 1943, defendant's percentage was computed on 70% only of total sales of all of said markets except the markets managed by Lindquist and Brown and Frank Blunden. On these two markets defendant's percentage was computed on 50% and 60%, respectively, of their total sales.

4. That no rent was actually paid by defendant under Exhibit 'A.' The manner of arriving at defendant's percentage of gross sales was as follows: The total amount of weekly gross sales was reported to defendant, together with check for 10% thereof, up to September 1, 1943, and, after that time, said percentage was reduced to 7%, and in the cases of Lindquist and Brown and Frank Blunden the percentage was reduced to 5% and 6%, respectively. The balance, after deducting all expenses, including rent, was retained by the manager.

Dated at Seattle, Washington, this 15 day of November 1944.

GEORGE H. LAYMAN

District Enforcement Attorney

C. E. HUGHES

Litigation Attorney
Attorneys for Plaintiff.

ALMON RAY SMITH

HENRY CLAY AGNEW

Attorneys for Defendant.

[Endorsed]: Filed Dec. 1, 1944. [26]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL

James Henry Packing Company, defendant, moves for an order dismissing the above entitled action on the grounds, as alleged affirmatively in its amended answer, that this action was not instituted nor authorized by the plaintiff, and that the persons who instituted and are prosecuting the action acted, and are acting, without authority in law or in fact.

A statement of reasons in support of the motion and the citation of authorities on which defendant relies is attached hereto.

ALMON RAY SMITH

HENRY CLAY AGNEW

Attorneys for Defendant.

STATEMENT OF REASONS IN SUPPORT OF MOTION TO AMEND ANSWER

The attorneys for the plaintiff admit that no specific authority was given by Chester Bowles, Administrator, to commence this action, and, according to a brief heretofore served by said attorneys for plaintiff and filed in opposition to defendant's motion for leave to amend its answer affirmatively alleging such absence of authority, it is apparent that the attorneys rely on certain general provisions in the Emergency Price Control Act of 1942 and certain General Orders which defendant contends do not constitute the authority to bring the suit, and that the act of instituting the

suit was void and cannot be validated by subsequent recognition or ratification.

Authorities in support of defendant's motion are hereto attached in the form of a trial brief.

ALMON RAY SMITH
HENRY CLAY AGNEW

Attorneys for Defendant [28]

[Title of District Court and Cause.]

TRIAL BRIEF RE AUTHORITY TO
INSTITUTE SUIT

Upon leave of court first obtained, and over the objection of counsel for plaintiff, defendant amended its answer to add to its affirmative defense a paragraph reading as follows:

“Defendant alleges that this action was brought under Section 205 (e) of the Emergency Price Control Act of 1942 in the name of Chester Bowles, Administrator of the Office of Price Administration, but not by said Administrator, and said action was instituted without authority from said Administrator, and said Administrator has no right or discretion under the provisions of said Emergency Price Control Act of 1942, or any other law, to delegate his authority to bring such an action, nor did said Administrator attempt to delegate such authority to the persons who instituted said action, and the act of the per-

sons who instituted said action was without authorization in law or in fact.”

It is admitted by counsel for plaintiff that Robert C. Findley and A. V. Stoneman, the attorneys who instituted this action, did so without specific authority from the Administrator of the Office of Price Administration to do so.

Defendant contends that authority to bring this suit could not be delegated, and, in fact, was not delegated, and that the void action of the unauthorized persons who brought the suit cannot be validated by subsequent recognition or ratification by the Administrator. [29]

The Emergency Price Control Act of 1942, under which this action was commenced, confines the right to bring such an action to the Price Administrator and to the Price Administrator only. The Act does not permit the delegation of this authority, and in this respect it differs from many recent Congressional enactments, including the Securities Exchange Act of 1933, the Securities Exchange Act of 1934 and the Public Utility Holding Company Act, all of which are cited in the Cudahy Packing Co. case hereafter referred to.

The case chiefly relied on by the defendant is *Cudahy Packing Co. v. Holland* (63 SCR 651—315 U. S. 357). In that case the Administrator of the Wage and Hour Division attempted to delegate his authority to issue a subpoena duces tecum. In construing the Fair Labor Standards Act, under which the action was brought, Chief Justice Stone,

Done in Open Court January 19th, 1945.

Exceptions by defendant and same allowed.

CHARLES H. LEAVY

District Judge

Presented and Approved by:

GEORGE H. LAYMAN

C. E. HUGHES

Attorneys for Plaintiff

Copy received this 17 day of Jan. 1945.

ALMON RAY SMITH

Attorney for Def.

[Endorsed]: Filed Jan. 19, 1945. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This mater having come on duly and regularly for trial December 12, 1944, before the Hon. Charles H. Leavy, District Judge, plaintiff appearing by his attorneys, George H. Layman and C. E. Hughes, and defendant appearing by its President, O. B. Joseph, and its attorneys, Almon Ray Smith and Henry Clay Agnew, and evidence having been submitted on behalf of plaintiff and defendant, and this court being duly advised in the premises, makes the following:

FINDINGS OF FACT

I.

That the facts stipulated in the Stipulation and Supplemental Stipulation filed herein, are true and correct, and are hereby incorporated herein and made a part hereof by this reference.

II.

That on or about July 1, 1943, defendant submitted to the Chief Attorney for the Seattle District, Office of Price Administration, at Seattle, Washington, a form of "Lease" and "Contract of Employment", substantially the same as Exhibits "A" and "B" attached to said Stipulation, except that said lease was terminable upon thirty days' notice; that said Chief Attorney on said date advised defendant and his attorney that said lease and contract were an evasion of [33] Maximum Price Regulation 169 and particularly criticised said thirty day cancellation provision; that said defendant immediately thereafter re-drafted said lease and omitted therefrom said thirty days' terminable provision, and forthwith executed and put into effect said leases and contracts of employment beginning at various dates from July 1st to July 22, 1943.

III.

That on July 30, 1943, said Chief Attorney notified defendant by letter that said modified leases and contracts constituted an evasion of Maximum Price Regulation 169, and again on August 30, 1943, the Chief Enforcement Attorney notified defendant by letter that said leases and contracts were an evasion

of said regulation and must be terminated, but allowed defendant a reasonable time to terminate same.

IV.

That said defendant failed and neglected to take any steps to terminate said leases and contracts until September 24, 1943, at which time it notified said 25 meat markets to "omit or deduct all receipts of beef and veal furnished by us" but continued thereafter to enforce said leases and contracts and to collect from 5% to 7% of the gross sales of said meat markets until on or about November 8, 1943, after it had collected \$19,149.64 in excess of the ceiling prices, at which time said leases and contracts were mutually cancelled by the parties thereto as of November 1, 1943.

V.

That defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any Social Security tax for the alleged [34] managers or other employees of said stores, as provided by law, nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts, nor at any time, filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores, nor make or file any returns showing any sales tax or business tax due said State from said stores, as provided by the laws of the State of Washington; that defendant never inquired of

the owners of said stores or of said 25 meat markets concerning any of the terms or conditions of their leases with the owners of said premises; that the amount of monthly rental fixed by defendant as lessee of said stores was an arbitrary sum, no part of which was paid or credited to any of said 25 markets; that defendant never gave to any of said 25 markets any instructions as to the management or as to the books and records kept or to be kept by said stores, and never authorized any of the obligations incurred by said markets; that all invoices from defendant to said 25 markets covering all meats were exactly the same after the execution of said leases and contracts as before; that no change in the operation of said markets was ever given the public either by notices or by signs of any kind; that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169; that no part of said overcharge has been returned to said 25 markets or paid to plaintiff. That said 25 markets were selected by defendant [35] from several hundred markets supplied with meats by defendant at said time as strategic outlets for its meats.

VI.

That said leases and contracts were and are forbidden evasions of Maximum Price Regulation 169,

and were made by defendant for the purpose of securing a higher price for its beef than that permitted by Maximum Price Regulation 169.

VII.

That the gross sales of said 25 stores in 1942 exceeded \$500,000.00; that Maximum Price Regulations 336 and 355, effective at all times during 1943, required any operator of four or more retail stores, if their total gross sales exceeded \$500,000.00 in 1942, to sell to consumers at prices lower than the ceiling prices actually charged by said 25 markets during the life of said leases and contracts.

VIII.

That from July 1st to September 15, 1943, defendant received from said 25 markets \$13,995.14 in excess of Maximum Price Regulation 169, and from September 15 to November 8, 1943, defendant received from said 25 markets \$5,154.50 in excess of Maximum Price Regulation 169. That up to and including September 15, 1943, was a reasonable time allowed defendant to cancel said leases and contracts; that failure to cancel said leases and contracts by September 15, 1943, after said letters of July 30 and August 30, 1943, was an unreasonable delay and said collections in excess of said Maximum Price Regulation 169 was done knowingly by said defendant and was the result of its failure to take practicable precautions against the occurrence of said violations. [36]

IX.

That defendant should be required to pay plaintiff on behalf of the United States single the amount of the overcharge from July 1st to September 15, 1943, in the sum of \$13,995.14 and 1½ times the overcharge from September 15, 1943, to November 8, 1943, in the sum of \$7,731.75, making a total sum of \$21,726.89 together with costs of suit.

X.

That the above cause was instituted and prosecuted by the duly appointed attorneys for plaintiff at Seattle, Washington, under the provisions of Section 201 (a) of the Emergency Price Control Act of 1942 and amendments thereto, General Order No. 3 as amended October 2 and November 26, 1942 (7FR7910 and 9909), Administrative Order No. 4, part 1, Supplement 7, issued by the Administrator of the Office of Price Administration December 29, 1943, authorization issued May 1, 1943, by the Regional Enforcement Attorney for the 8th Region which includes the Seattle District and Second Revised Order No. 3, effective September 7, 1944 (9FR11137). That by reason of said authorizations said local enforcement attorneys were duly authorized to bring this action and to prosecute same without further specific authority from plaintiff.

Done in Open Court this 19th day of January, 1945.

Exceptions allowed.

CHARLES H. LEAVY

District Judge [37]

CONCLUSIONS OF LAW

From the foregoing Findings of Fact this court renders the following conclusions of law:

I.

That the leases and contracts referred to in the above findings were made by defendant for the purpose of securing a higher price for its beef than is permitted by Maximum Price Regulation 169, and were and are a forbidden evasion of said regulation. That defendant's failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay and said evasion of Maximum Price Regulation 169 was done knowingly by said defendant and was the result of its failure to take practicable precautions against the occurrence of said violations.

II.

That plaintiff is entitled to judgment against defendant above named for single the amount of the overcharges from July 1st to September 15, 1943, in the sum of \$13,995.14, and one and one-half times the overcharge from September 15th to November 8, 1943, in the sum of \$7,731.75, making the total sum of \$21,726.89, together with costs of suit.

III.

That plaintiff's attorneys were duly authorized to bring this action and to prosecute same without further specific authority from plaintiff than that mentioned in the findings herein.

Done in Open Court January 19, 1945.

Exceptions allowed.

CHARLES H. LEAVY

District Judge

Presented and Approved by:

GEORGE H. LAYMAN

C. E. HUGHES

Attorneys for Plaintiff

[Endorsed]: Filed Jan. 19, 1945. [38]

United States District Court Western District
of Washington Northern Division

No. 884

CHESTER BOWLES, Administrator, Office of
Price Administration on behalf of the UNITED
STATES OF AMERICA,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY, a Cor-
poration,

Defendant.

JUDGMENT

This matter having come on duly and regularly to be heard. December 12, 1944, before the Hon Charles H. Leavy, District Judge, plaintiff appearing by his attorneys, George H. Layman and C. E. Hughes, and defendant appearing by its president, O. B. Joseph, and its attorneys, Almon Ray Smith

and Henry Clay Agnew, and evidence having been submitted on behalf of plaintiff and defendant, and this court having made its Findings of Fact and rendered its Conclusions of Law, and being duly advised in the premises, it is,

Therefore Ordered and Adjudged that plaintiff above named be and is hereby awarded judgment against James Henry Packing Company, a corporation, defendant above named, in the sum of \$21,726.89 and costs.

It Is Further Ordered and Adjudged that plaintiff's attorneys were duly authorized to bring his action and to prosecute same without a review of any of the facts by the Administrator of the Office of Price Administration personally.

Done in Open Court this 19th day of January, 1945.

CHARLES H. LEAVY

District Judge

Presented and Approved by:

GEORGE H. LAYMAN

C. E. HUGHES

Attorneys for Plaintiff

Copy received this 17 day of Jan. 1945.

ALMON RAY SMITH

Attorney for Defendant

[Endorsed]: Filed Jan. 19, 1945. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on January 19, 1945, determining the damages to be recovered by the plaintiff to be in the sum of \$21,726.89.

DAVID LONDON

Acting Regional Litigation
Attorney

C. E. HUGHES

Enforcement Attorney
Seattle District Office

Copy rec'd April 5, 1945.

ALMON RAY SMITH P.V.

Attorney for Defendant

[Endorsed]: Filed Apr. 6, 1945. [41]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD

Comes Now the defendant above named and, as Cross-appellant in the above entitled action, submits the following as its designation of additional portions of the records on its cross-appeal to the

United States Circuit Court of Appeals for the Ninth Circuit:

Number 13: Order Granting Leave to File a Complaint in the Emergency Court of Appeals filed February 12, 1945.

Number 14: Notice of Cross-appeal of the defendant.

Dated at Seattle, Washington, this 25th day of May 1945.

ALMON RAY SMITH

Attorney for Cross-appellant

Copy rec'd May 28, 1945.

C. E. HUGHES

Atty. for plaintiff.

[Endorsed]: Filed May 28, 1945.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE A COMPLAINT IN THE EMERGENCY COURT OF APPEALS

Upon application of the defendant timely made and filed herein under Section 107 (a) (1) of the amendments to the Emergency Price Control Act of 1942, approved June 30, 1944, and, after hearing arguments of counsel for both plaintiff and defendant;

It is hereby Ordered that James Henry Packing Company, the defendant, be and it is hereby

granted leave to file, within thirty days from the date hereof, in the Emergency Court of Appeals, a complaint against the Administrator, setting forth objections to the validity of any provision which the defendant is alleged to have violated, and particularly Maximum Price Regulation No. 169, as amended, and that until such complaint is filed, and during the pendency of any judicial proceeding following the filing of such complaint, proceedings in this action shall be stayed.

It is further Ordered that upon the entry of this order, the defendant deposit in the registry of this court the amount of the judgment rendered against it in this action, together with interest at the legal rate for one year and costs of suit to [46] abide the judgment of the Emergency Court of Appeals or the Supreme Court of the United States if certiorari is granted; and in case the complaint of the defendant filed in the Emergency Court of Appeals is dismissed, or in case an order or judgment is entered therein overruling the objections set forth in the defendant's said complaint, and certiorari is not granted by the Supreme Court, then the deposit in the registry of the court shall be applied to the satisfaction of the judgment rendered herein, with interest and costs. Should any excess remain over the amount required for such purposes, such excess shall be refunded to the defendant; but in case there is a deficiency, the amount thereof shall forthwith be paid to the clerk of this court by the defendant; provided, however, that in case the defendant perfects an appeal from the judgment ren-

dered herein to the United States Circuit Court of Appeals, then such deposit shall constitute the supersedeas bond on appeal; provided further, that if the court shall deem such amount inadequate, the defendant shall forthwith deposit such additional amount as the court may fix.

Done in Open Court this 12th day of February, 1945.

CHARLES H. LEAVY,
Judge

Presented by:

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant

Approved as to form:

GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 12, 1945. [47]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL TO THE
CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that James Henry Packing Company, a corporation, defendant above named, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 19, 1945, and the whole thereof.

Reference is hereby made to the Order Granting Leave to File a Complaint in the Emergency Court of Appeals entered and filed herein February 12, 1945, in which order it is provided that the defendant deposit in the registry of this court the amount of the judgment rendered against it in this action, together with interest at the legal rate for one year, and costs of suit, and that in case the defendant perfects an appeal from the judgment rendered herein to the United States Circuit Court of Appeals, then such deposit shall constitute the supersedeas bond on appeal. In pursuance of said order, the defendant deposited in the registry of this court on February 15, 1945, the sum of \$23,-080.50.

This Notice of Cross-appeal is given and filed without prejudice to the defendant's rights under said order of February 12, 1945, which order provides that, during the pendency of the complaint and judicial proceedings in the Emergency Court of Appeals, [48] proceedings in this action shall be stayed in accordance with Section 204 (e) (2) (i) (iii) of the Emergency Price Control Act of 1942 as amended.

ALMON RAY SMITH

HENRY CLAY AGNEW

Attorneys for Defendant.

Copy received April 16, 1945.

C. E. HUGHES

By T. MURPHY

Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1945. [49]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

Good cause appearing therefore, it is hereby ordered that the Clerk of this court transmit to the Circuit Court of Appeals as part of the record of Appeal on this cause, all of the original exhibits introduced in evidence, to-wit:

Plaintiff's Exhibits 1, 2 and 3.

Defendant's Exhibits numbers A-1 to 10 inclusive.

Done in open court this 25th day of June, 1945.

CHARLES H. LEAVY

District Judge

Presented by:

DANIEL M. REAUGH

District Enforcement Attorney
of Counsel for Plaintiff
Appellant.

Approved:

ALMON RAY SMITH

Attorney for Defendant
Cross-Appellant

[Endorsed]: Filed June 25, 1945. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 50, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designations of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Testimony, the original of which is sent up as part of this record, constitute the record on appeal from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated January 19, 1945. [51]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's Fee (Act of February 11, 1925) for making record, certificate or return.

88 folios at 05c\$ 4.40

30 folios at 15c	4.50
Appeal fee (Section 5 of Act) (\$5.00 each side)	10.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits....	.50
	<hr/>
Total.....	\$19.90

I further certify that the costs of this record has been equally divided between the respective parties to the appeal.

I further certify that one-half of the total amount above, to-wit, \$9.95, has been paid to me by the attorneys for the Appellee and Cross-Appellant. The remainder, in the sum of \$9.95, has not been paid to me for the reason that the appeal on behalf of the Appellant and Cross-Appellee is being prosecuted on behalf of the Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 27th day of June, 1945.

[Seal]

MILLARD P. THOMAS,
Clerk.

By TRUMAN EGGER,
Chief Deputy Clerk. [52]

In the District Court of the United States, for
the Western District of Washington, Northern
Division

No. 884

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 12th day of December, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for hearing before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Northern Division, in the City of Seattle, and State of Washington; the Plaintiff appearing by Messrs. C. E. Hughes and Geo. H. Layman, and the defendant appearing by Messrs. Almon Ray Smith and Henry Clay Agnew;

Whereupon the following proceedings were had and done, to-wit: [3*]

The Court: I just received the file after coming this morning, and I have tried to go through it for the purpose of familiarizing myself with the issues, and I have only a very general idea as to what they

*Page numbering appearing at foot of page of original Reporter's Transcript.

are. For that reason I would appreciate a statement by both counsel for the plaintiff and defendant, briefly, as to the facts. I say that because there appear to be at least two stipulations on facts in this record, and so I will hear from whoever desires, on behalf of the plaintiff, to make a statement as to just what the issues are and whether they have changed any from the original prayer for relief.

Mr. Hughes: If the Court please, this is an action by Chester Bowles, Administrator of the Office of Price Administration, on behalf of the United States of America, against James Henry Packing Company, a corporation, of this city, to recover on behalf of the United States, \$57,448.92, treble the amount of overcharges in the sale of beef and veal, and wholesale cuts, thereof, by the defendant, to 25 retail markets at or near Seattle from July the 1st, 1943, to November the 8th, 1943, in violation of Maximum Price Regulation 169 as amended.

Now Exhibit "A," attached to the Complaint, if your Honor will kindly turn to that Complaint—

The Court: Is that the original Complaint?

Mr. Hughes: That is the original Complaint. Your Honor will see it sets out in detail the names of the owners and operators of these 25 retail meat markets, and that sets out the dates and the amounts paid by each of these meat markets to the defendant, in excess of the [4] ceiling price, published by Regulation 169, and that excess was \$19,149.64. Now that sum trebled is fifty-seven thousand, plus, which we are asking against the defendant in this action.

Your Honor will see the Answer—the amended

Answer of the defendant. It denies it sold any beef to any of these 25 owners, and alleges that during the period—that is, from July the 1st, 1943, to November the 8th, 1943, these 25 operators were employees. That is their defense, briefly, that they were employees of the defendant.

Now Your Honor will see from the stipulation on file here, and the supplemental stipulation on file, entered into between the plaintiff and the defendant, that stipulation admits, briefly, incorporation of the company, it is engaged in the slaughter house and meat packing business in Seattle, and that it has been and is now engaged in the sale, wholesale, of beef, lamb, pork, and wholesale cuts to retail meat dealers.

The stipulation further admits that Maximum Price Regulation 169, which was published pursuant to the Emergency Price Control Act fixing the maximum price of beef and wholesale cuts, was in effect at all times during 1943,—that is, during the period covered by these since July 1, 1943 to November. As a matter of fact, it was in effect long before and has been ever since.

It further admits that some time prior to July, 1943, each of these 25 retail meat markets, owned and operated their retail meat markets at Seattle, and during that time it bought from the defendant, beef and [5] other meats, for resale, at which time, the stipulation admits, prior to July, 1943, there was a great scarcity of beef; that during July, 1943, these same 25 individuals, executed with the defendant, all on the same form and pattern, a lease—a “so-called lease,” I will say—what they denomi-

nate a lease, and the form of which is attached to the stipulation set out as Exhibit "A," and another instrument denominated "contract of employment." That is denominated "B" in the stipulation. These instruments were finally cancelled about November 8, 1943, so Your Honor can see they were in effect from practically July the 1st to around November the 8th. I say July the 1st. I mean the first part of July. Some of these contracts, and so-called contracts and leases were signed all the way from about the 1st of July, I think, until about the 20th, but they were all cancelled about November the 8th.

The stipulation further admits that after the execution and during the life of these two instruments, this alleged lease and contract of employment, the defendant delivered to these meat markets a much greater quantity of beef, and other meats, too, than they did before July the 1st, 1943. It also admits that after July the 1st, 1943, and during the life of these contracts, the defendant invoiced its meats to these retail stores exactly as it had done previously, setting out the quantity and the number of pounds and the price, and it also admits that these markets paid to the defendant not only the Maximum price fixed by Maximum Price Regulation 169, but paid in addition thereto, \$19,149.64. Now that sum was [6] a percentage of the entire gross income derived from the business of these 25 markets, as provided in the employment contract. This gross income included income also from the sales of poultry, fish, butter, eggs, cheese

and fruit, none of which was sold by the defendant to these retail meat markets.

Now the stipulation further admits that the itemized statement set out in the Complaint, which Your Honor has just looked at—

The Court: Now, what sum did you say was the gross income of these markets?

Mr. Hughes: I do not know the gross income, but—

The Court: You mean nineteen thousand—

Mr. Hughes: It started out with ten percent of the gross income of these meat markets, and I say that included a lot of things that even was not sold to these meat markets by the defendant.

Now the stipulation further admits that the itemized statement attached to the Complaint which Your Honor has just seen, showing the dates and the amounts paid to the defendant, which totals a little over nineteen thousand dollars, is correct; that those amounts were actually paid.

Now the method used, Your Honor, in calculating this percentage, is that each of these markets, after they had paid the maximum price for the beef and meat, added up his total cash sales—not only his total cash sales, but also his sales on credit, and took ten per cent of that sum before any deduction was made, and paid the [7] defendant these weekly payments, which, on November 8th, totalled nineteen thousand—a little over nineteen thousand dollars, I will say; that about some time in September, this percentage was changed from ten per cent to seven percent—about September. As to two mar-

kets, Frank Blunden and Lindquist & Brown, they paid six percent and five percent. The balance, after paying expenses was kept by the meat markets—operators of the meat markets, so that this plan worked out that the defendant got nineteen thousand—over nineteen thousand dollars in excess of the ceiling price.

The Court: That is the wholesale ceiling price?

Mr. Hughes: That is the wholesale ceiling price—the sales to the retail stores.

Now, Your Honor will notice all this is admitted in the stipulation. If I have not stated this correctly, Mr. Smith, I wish you would correct me, because I want to get it exactly right.

Now each of these contracts required these meat markets to pay all the expenses. Of course that was done after the ten percent was taken out.

Your Honor will notice that the lease, attached to the stipulation which is marked Exhibit "A," which was the same for all of these 25 meat markets, provided for a stipulated monthly rental to be paid by the defendant to these meat markets, but the stipulation admits that no rent was ever paid by the defendant to any of these meat markets, and so far as the stipulation is concerned, there is no consideration for this lease or the contract of employment, for the payment of \$19,149.64 [8] to the defendant, except he was getting a much greater supply of meat during this period. In other words, it was a case of sign the lease and contract, or get little or no beef. So I think it is obvious from the stipulation that this is a device for the sole pur-

pose of evading Maximum Price Regulation 169, in order to get a high price for meats, not provided by the regulation; that the defendant has admittedly received \$19,149.64 in excess of the ceiling price, as fixed by Maximum Price Regulation 169.

Now in connection with the stipulation, if I may read Section 1364.406(a) of Maximum Price Regulation 169, 8 Federal Register 4097, effective April 3, 1943—that is some three months before these contracts were made.

“The price limitation set forth in this revised regulation shall not be evaded either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase, or receipt of, or relating to beef, veal, or processed products, separately or in conjunction with any other commodity, or service, or by way of any commission, service, transportation, wrapping, packaging, or other charge, or discount, premium, or other privileges, or by tying agreement or other trade understanding.”

Now that is provided in Price Regulation 169.

Now reading from Section 1364.408, Revised Maximum Price Regulation 169:

“Enforcement. Persons violating any provisions [9] of this Revised Maximum Price Regulation No. 169, are subject to the criminal penalties, civil enforcement actions, proceedings for suspension of licenses, and suits for treble damages, provided for by the Emergency Price Control Act of 1942, as amended.”

Now, Your Honor, stated briefly, the stipulations on file here admit that Revised Maximum Price Regulation 169, fixing the ceiling price of beef, was in full force and effect during the life of these instruments. I do not want to call them leases. I do not think they were really leases, nor were they really contracts of employment, and I have so designated them in the stipulation as "so-called lease," or exhibit—I refer to them as Exhibits "A" and "B."

They further admit—the stipulation admits that the defendant received from these 25 meat markets, during the period from July the 1st, to November the 8th, \$19,149.64, in excess of the ceiling price, and the defendant in his answer has now pleaded that they were merely its employees, so I believe that the burden of proof is now upon the defendant to show they were its employees.

Mr. Smith: Your Honor may remember this case—about two months ago we were here before Your Honor upon a motion to strike it from the trial calendar because of an action pending in the court of—Emergency Court of Appeals. Your Honor did not strike it from the calendar, but it was continued and came up mechanically before Judge Bowen, and he said although the decision in the Armour case is not down, it is expected any day. [10]

At this time, I am filing a motion to dismiss, Your Honor. Counsel for plaintiff has, and I believe will admit, that there was no specific authority given to institute this suit.

The defendant bases its motion to dismiss upon an allegation in its affirmative answer which was amended over the objection of the plaintiff, and by leave of the Court, to allege that this action was brought under Section 205(e) of the Emergency Price Control Act of 1942, in the name of Chester Bowles, Administrator of the Office of Price Administration on behalf of the United States of America, but not by said administrator and without authority from said administrator, and said administrator has no right or discretion under the provisions of 94-(t) or any other law to delegate his authority to bring such an action, nor did said administrator attempt to delegate such authority to the persons who instituted and are prosecuting said action, acted and are acting without authorization in law or in fact.

We are relying chiefly, Your Honor, upon the case of *Cudahy Packing Company vs. Holland*, which I would like at this time to present to the Court. This case is reported in 62 Supreme Court, Page 651.

(Whereupon, argument by respective counsel.)

The Court: I might state to you that I have no hesitancy in holding against the contention of the Price Administrator that the matter of a dismissal for lack of authority is not properly raised in this case. I shall hold that it is, and pass upon it upon its merits, rather than [11] whether it should be pleaded affirmatively or not. In passing upon it

on its merits I want to say that I asked the question of you, Mr. Smith, in reference to whether Mr. Bowles or whoever that individual that happened to be Price Administrator at the moment might be, would personally have to pass upon and exercise a discretion in the matter of instituting an action such as the instant case, present. If Congress intended the Act to be so limited, they would have written into it appropriate language, expressing such limitation. It is silent in that regard—if Congress had so intended they would have made of a highly emergent war measure that otherwise has definite limitations as to its continuance and existence written into it and likewise this limitation.

Mr. Smith: It does not follow that because Congress required this authority to come from the Administrator that he would investigate the merits of every case, any more than the chief executive of every corporation would have to know everything he signs, but a telegram saying "Bring this suit" would be compliance. Now there could be such a thing as some of these young attorneys get in the suit—

The Court: Of course, the answer is, these are all civil service employees. They have all taken an oath. They all occupy an official position. Some of them doubtless assume more powers than they have, but if they do those unusual things, it would be but a short time until they would be discharged and the suit unauthorized would be dismissed.

Mr. Smith: My point was, Your Honor, if a [12] countersuit lay it would be against Chester

Bowles, and could not Chester Bowles—could not his defense be “I did not authorize this suit?” Who did authorize the suit?

The Court: I do not know whether there would be any such thing as a counter-suit against Chester Bowles, but assume there were. I do not think I can decide the issue that presents itself upon that assumption.

I am going to have to hold against you, Mr. Smith, and in so doing I am disregarding, perhaps in a large measure, these various regulations, all of which lend color and weight to the contention of the plaintiff that your motion should be denied, and I shall go directly to the Act and the language of it, and I refer to section 201, sub-division (a), which provides for the appointment of an administrator and his compensation, and then it has this specific language that is extremely comprehensive, and it seems to me covers the situation here completely:

“The Administrator may, subject to the civil service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act.”

Now whoever are his appointees, and they are numbered now by the thousands, they have had to qualify under the civil service laws, rules and regulations, and they—I assume all of them—take an oath, because it is quite customary with that type of government employee that they do, that they will carry out the obligations of the office they assume, in addition to their respect for the [13]

Constitution and laws of the United States and obedience to them.

The language that I have just quoted, though, makes it very clear to me that these employees, when once designated and once qualified and placed upon the federal payroll and given the responsibilities that go with the particular position to which they have been named, can then do any of the things that the Administrator can do if he permits them, and we have a mass of regulatory law here that has been cited already, indicating that in cases of this nature he does permit it.

If a mistake were made or if foolish and ill-considered actions were being instituted to such a degree that they harrassed and annoyed the citizen and destroyed his business and his reputation then of course such cases would not—assume the Administrator was so indifferent as to allow that to continue, such cases could not possibly be carried to a successful conclusion in court—in any court of the land, because when the facts were once developed the action would be dismissed. I feel therefore that we, in passing upon the issues raised in the instant case, are not called upon to indulge in the presumption that there will be, or that there have been abuses. I am frank to say that if the facts in this case, if they need go beyond the stipulated facts, indicate abuse in the case, I would not have the slightest hesitancy in dismissing it, but I am passing now, only on the question as to whether this action is one that is properly before the Court—whether the Court has jurisdiction to proceed by

reason of the fact that, as [14] contended by the defendant, it was unauthorized on the part of the attorneys who brought it.

Further emphasizing and perhaps elaborating on the language quoted from Section 201-(a), a reading of that whole section and certain parts of it, particularly, indicates so clearly what Congressional intent must have been. If you will note, subdivision (d):

“The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.”

and I think as suggested in the argument, that these orders—and they are by the hundreds now, are made by civil service employees who have been appointed by the Administrator, and we know, as a matter of practical application, that the Administrator himself as an individual, can not possibly either dictate or direct the orders, nor know the facts upon which they are all based, and doubtless in numerous of such orders some immediate subordinate or assistant administrator signed his name to them.

Going farther to Section 202, and that deals with investigations, records, and reports, subdivision (a) says he is:

“—authorized to make such studies and investigations to conduct such hearings, and to obtain such information.”

Now that of necessity, to be practical in operation

—or to be practical and be able to be put into operation at all, calls for scores of assistants, in a nation as [15] great as this is, and scattered over a territory as widely as this is.

Subdivision (b) of Section 202 again refers to the fact that the Price Administrator is authorized by regulation or order to require any person who is engaged in the business of dealing with any commodity—it covers the whole commercial life of the nation.

Mr. Smith: May I interrupt Your Honor again? Everything Your Honor has said I believe is answered in the Cudahy case. Might I suggest that Your Honor look at that case during the noon recess?

The Court: I shall do so, but I indicated what I thought was a distinction, but I want to look it over and if we go on with Section 202, we find subdivision (c), again, and subdivision (h)—all of these, and I am not going any farther—all of these indicate to me that the Administrator is required to proceed by subordinate appointees, and Congress fully intended that such should be the case. If I should place any other construction upon the Act, it would simply create a situation that would nullify the effective operation of a highly emergent statute that can exist only during the period of the emergency, and by its very terms is limited to such a period.

I shall, before ruling, since you have requested it, look this case over, but I think I will let you proceed on the assumption that I have overruled your

motion and shall overrule it for the purpose or orderly procedure—with that understanding.

Now, what order do you desire to follow in [16] the matter of submitting your proof?

Mr. Agnew: The defendant would like to make an opening statement on the merits of the defendant's position, at this time.

The Court: Very well, then.

Mr. Agnew: The defendant will present evidence—none of it inconsistent with the stipulated facts, but some of it in explanation of them, and in the conditions, and proof of the conditions which brought about the stipulated facts.

The evidence presented by the defendant will show that prior to—just prior to last July 1st, we had the ceiling price established I believe, by this Regulation 169, naming the wholesale prices on wholesale cuts of beef and veal. Now the James Henry Packing Company did not handle veal at any time, and never has, so veal is not involved in this action. I believe the stipulation somewhere so shows.

The Court: Yes, there is some such—

Mr. Agnew: The situation was local, as Mr. Joseph, as the manager of the James Henry Packing Company will show. Since there was no ceiling price fixed upon livestock, that it became at that time, just prior to July, at least locally, and probably all over the United States, impossible to process livestock because there was no room for the cost of processing. After you processed it, why you had

to sell it at a complete loss. As additional proof, that that was the situation.

At the Congressional hearing as to this 169, [17] the official representative of the Price Administrator appeared and testified "yes" that it was true; that because of failure to place a ceiling price upon livestock carcasses that no proper allowance had been made for the cost of processing, making it impossible to carry on except at a loss.

Now we are conscious of the rule before your Honor and in this court, we can not attack 169 because of the unreasonableness of it, although the procedure is left open to us again by reason of a recent amendment, but not at that time. However, the Armour Packing Company raised that attack directly before the proper court, the Emergency Court, and that matter has been argued before that court. I believe you remember the date?

Mr. Smith: About two months ago.

Mr. Agnew: Still under advisement, at any rate. One of those cases you say it will be decided tomorrow, but sometimes it isn't, but it has been under advisement about 60 days now,—but that was the situation that motivated, anyway, and caused the James Henry Packing Company to go into the retail business.

As to the facts of what happened, there will be very little dispute between the parties—I don't believe any, on any real material point.

As to the legal effect that Your Honor should give to what happened, why there is and will be, a violent disagreement.

Now around July 1st, the evidence will show that most of the 25 retail markets that are involved here, were closed. They couldn't get meat, and so they closed [18] up. The remaining ones were about to close.

We will show, too, that the shortage of meats was not any more acute in beef than it was in pork, hams, bacon, and pork cuts of that kind, which were not involved by this regulation, whatsoever. In other words, all 25 of these markets were out of those, too, and it was just as equally difficult to get those, if not more so as to, in some cases, get a supply of beef, to prevent themselves from going out of business.

The evidence will show that here, locally in King County, and in Seattle, many packing companies owned retail establishments. The James Henry did not, except one. They had one large retail store which they operated, paying the manager and the employees salaries to operate it, and had for a number of years.

The Court: Isn't it involved in this case?

Mr. Agnew: It is not involved, or questioned—that operation is not questioned in this proceeding. Other packing companies, however, particularly here in Seattle, had a good many outlets in which they were financially interested, or actually owned and leased outright—leased them, themselves, and operated them.

The evidence, of course shows in this case, Your Honor, that no ultimate consumer—no claim is made that any ultimate consumer was ever charged

higher than the ceiling price for meat they bought. There is no question about that having happened, so any construction of the facts that will be made by Your Honor, should probably be made with that in mind; that the ultimate consumer was in no way victimized. As a matter of fact, he [19] was helped where otherwise he wouldn't. These various individuals in these various markets came to the James Henry Packing Company, non-approached, asking if there was any arrangement possible, whereby the markets would be taken over by the James Henry Packing Company.

Originally a lease was drawn, different from the one that you see attached to the exhibit, and an employment contract, all about the same, and these men were anxious to sign it, so Mr. Joseph, acting for the James Henry Packing Company took those form leases up with their attorney and then the two of them went to the local office of the O.P.A. for approval. Mr. Hartson was the local officer in charge at that time, and there was several conferences with him about it. He expressed in a conference, about July 1st, it was—approximately then, great disapproval of the form of the lease. He said as long as that provision was in there that allowed either side to cancel this lease on this particular market at their will, that he would have to construe that lease not to be a substantial enough lease, as to not constitute an evasion of the spirit of the O.P.A. Act. So then Mr. Smith, representing the James Henry Packing Company, agreed with Mr. Hartson

he would make that change or any other changes that Mr. Hartson would suggest in the leases. No other change being suggested, Mr. Smith redrafted all the leases and brought the final draft up to Mr. Hartson of the O.P.A. who, after reading it over, says, "That is a good lease, now."

Mr. Hughes: About when was that?

Mr. Agnew: Do you remember the date? [20]

Mr. Smith: About the early part of July—I don't know.

Mr. Agnew: Acting then on that representation, that these leases were then executed. With each lease Your Honor will notice is an employment contract. In each of the 25 cases it happens that the party who leased the market to the James Henry Packing Company, also was the same individual who entered into the employment contract to run the local—the retail market. The employment contract speaks for itself and shows its terms, but they are roughly this: Instead of paying a salary to operate the retail market that now belonged to the James Henry Packing Company, an arrangement was made where ten percent of the gross sales on everything, whether it was beef, butter, eggs, poultry, bacon, or whether it involved an O.P.A. regulation or not, ten percent of the gross was given to the James Henry Packing Company, and the manager, under the employment contract, was compensated by taking 90 percent of the gross, and he in turn was required to pay all expenses of operation by the employment contract, including rent.

The point is raised in the opening statement of

counsel that the stipulation shows that the James Henry Packing Company did not pay the rent, which is true, because in each case, as it happens, under the employment contract the manager would then immediately owe it back, because he had contracted to assume and pay that, and would therefore, under his employment contract, have had to return the check immediately he received it. Therefore, the formality of passing the checks between each other was [21] not gone through with, for the reason it would have been an empty thing. However, the evidence will show that there was in one or two cases some discussion of the employment manager quitting and leaving, although that did not happen.

This arrangement only lasted through two or three months. If that had happened, then the rent would have had to be paid, because the employment manager then would not be in a position of paying it to himself. James Henry Packing Company would have had to pay it to the owner.

That arrangement went on without criticism from anybody for at least up till about August 23, I think was the time. There were some conferences with the O.P.A. around July 30th, a letter was sent in which information was requested, but Mr. Joseph was in Canada, and there was some delay in that conference, and then when he got home he was sick in bed, so a new regulation was passed by amendment, No. 26. The regulation was dated August 16, 1943, and it is called Amendment 26 of the Price Control Act. It is an amendment of 169, I believe. Although it was dated August 16th, no word of it

was received here until August 23rd, and it came out in some of the press services, and I haven't got the exact language of that amendment before me, but it is substantially this, that I can give from memory. It said any device or agreement, short of complete ownership of a retail establishment by a wholesaler, will be deemed to be an evasion. Well anyway, as a result of that letter, Mr. Finley wrote on August the 30th, saying "this arrangement thus constitutes [22] an evasion of the ceiling prices fixed in the regulation, and in our view must now be terminated. A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions." That letter was dated August 30th, and which was signed then by Mr. Stoneman, who, I believe, has now left the department.

Then Mr. Smith and Mr. Joseph, representing the packing company, had several conferences in which they stated, "It seems to us, your objections to this carrying on a retail establishment in that this percentage applies to beef sales, which is the only thing involved under 169, and the estimates from all the markets except two were that the beef sales constituted 30 percent." Now they were charging ten, and in order to roughly make up and eliminate beef sales, they eliminated three percent and in correspondence, put that up to the O.P.A. as to whether or not that arrangement modification would satisfy the O.P.A., and there was considerable correspondence about that, ending in a conference on Novem-

ber the 2nd, in which Mr. Stoneman was present, Mr. Joseph and Mr. Smith, at the O.P.A. Office, where it was definitely then stated that since they appeared to be dissatisfied and that this three percent—throwing off the three percent did not seem to satisfy them, that they would immediately rescind and take steps to rescind the leases, and on the same day, letters were sent by the James Henry Packing Company to all these lessors, in which they stated the O.P.A. was dissatisfied with the legality of this [23] arrangement, now especially, since a new regulation had been passed and come into effect, and for that reason requested that they voluntarily rescind. And all of that was done within two or three days thereafter.

Now on the question of the James Henry Packing Company sending an invoice of whatever beef cuts, pork, and other cuts of meat to each of their own retail establishments, that was not billed—they were not billed, but an invoice in the wholesale price listed under 169 was sent for the purpose of information and bookkeeping only. The evidence will show that for years they followed that same practice in their own market that they have owned outright for years, here—that is, they send the wholesale billing and so by using that as an entry, a man can figure out what his ordinary profits should be, as a matter of bookkeeping. I believe that covers the stand on the matter.

The James Henry Packing Company will show they entered into this with good faith and with the intent, really, to make it permanent. Mr. Joseph,

for his own market, or for the James Henry Packing Company's own market, went way out of his way to get some good eastern beef, at great expense.—It was a finer grade of beef than ever handled by the packing company, in order to build up business for his own markets for the future, to build up their business, and the proof will show they generally regarded it as a permanent thing.

Immediately after taking over the market by leasing, forms were sent out for reports of the defendant's managers. Letters of instructions were sent to them, [24] relative to the matter. The insurance company was consulted as to liability insurance. Now that they owned these retail establishments, the evidence will show they took all the liabilities of ownership; that under the contract had there been any loss in operation, they would have had to pay it; that no meat was ever actually sold; that it was only delivered to their own retail outlets, and that at no time—legally speaking, they could have walked in the next day and pulled it out and taken it to any other market, because no title passed. No title was passed until it was sold to the ultimate consumer, who paid the legitimate and honest price.

The utmost good faith was exercised by the packing company throughout, and every move taken was taken up with the O.P.A. office, and the same day the O.P.A. office definitely made up their mind and said "no, because of this regulation you can't go on any more," letters went out rescinding these leases.

The Court: We still have five minutes. Do you want to make any further statement on the proof you are going to offer?

Mr. Hughes: I don't believe so, Your Honor.

The Court: When was this action instituted with reference to——

Mr. Hughes: I think November 27, 1943.

The Court: In November of 1943?

Mr. Hughes: Pardon me?

The Court: That was when Mr. Finley was still the Regional Attorney?

Mr. Hughes: I was mistaken when I said November. [25] It was filed on February the 29th, 1944.

Mr. Smith: There was an indictment returned in November, I believe, Your Honor, which was dismissed.

Mr. Hughes: This civil action was filed February 29th.

The Court: We will take an intermission now until 1:45 this afternoon.

(Recess)

1:45 o'Clock P. M.

The Court: Now you may proceed.

Mr. Hughes: Your Honor please, before we proceed further, I stated what this stipulation was between the parties, so in order to have the record clear, I would like to have it understood that the stipulation—the supplemental stipulation may be

considered as having been read in full, and as part of the record in this cause.

Mr. Agnew: No objection.

The Court: It will be so understood.

Mr. Smith: May I ask Your Honor, do you consider your ruling before recess the ruling on my motion, or will you make that now?

The Court: I read through this case and I distinguish it sufficiently from the instant situation that I shall adhere to the ruling that I made before the noon intermission, as being the ruling of the Court in this case. [26]

Mr. Smith: Then let the record show an exception.

The Court: Yes, and you may have an exception.

Mr. Agnew: Mr. Hughes, do you take the position we have the laboring oar, or are you going to introduce any further evidence?

Mr. Hughes: Yes, I do not think it is necessary to introduce any further evidence.

Mr. Agnew: If Your Honor please, the defendant first desires to read into the record a portion of the proceedings of October 26, 1943, before the Committee of Agriculture of the House of Representatives, relative to proposed ceilings on live cattle. I could introduce the whole of the printed document as an exhibit—I think I probably will, but I will read only the portion from pages four and five, as material.

The Court: Very well.

Mr. Hughes: If the Court please, I don't know what is in counsel's mind, but it does not seem to me any of this is material or pertinent to the issues involved in the case.

The Court: I assumed it is for the purpose of showing what the intent of Congress was in enacting the act, itself.

Mr. Agnew: It is for the purpose of showing acknowledgment of the conditions at the outset, under which we were working and not for the purpose of attacking this regulation, whatever, Your Honor, but for the purpose of—part of our proof of our general situation which motivated this arrangement for retail— [27]

Mr. Hughes: I don't still believe, Your Honor, it is material to the issues, and it is just simply reading into the record a lot of extraneous matter that I don't think the Court can consider.

The Court: How much material is there?

Mr. Agnew: The material would amount to about three-quarters of one page.

The Court: Objection will be overruled, and exception allowed.

Now before we leave this matter of these stipulations, there appear to be three stipulations, here, and the offer of proof made a short time ago apparently only covered a stipulation and a supplemental stipulation.

Mr. Hughes: That is right.

Mr. Agnew: I think the third stipulation is a stipulation in taking the order of proof, is all.

The Court: If that is what it deals with, why shouldn't it be made a part of the record?

Mr. Hughes: That should be. I overlooked that. That should be.

Mr. Agnew: That should be. I think Your Honor will notice in the stipulation we do not concede as a matter of law that the stipulated facts need explanation, but we are willing to voluntarily take the burden and put in our explanation, because we want to explain them anyway.

The Court: Yes.

Mr. Agnew: This hearing contains the statements—the portion I am reading, of J. F. Brownlee, Deputy Administrator for Price, Office of Price Administration, [28] J. F. Carroll, Director of the Food Price Division, Office of Price Administration, and R. V. Gilbert, Economic Adviser to the Administration office of Price Administration. Reading from page 4:

Mr. Kleberg of the committee asks this question, relating to 169: "Did anyone discuss the probabilities of the decision with the court, connected with the O.P.A., to give you an idea that the regulations as attacked might be construed to be illegal by the court?"

"Mr. Brownlee: Yes, sir.

"Mr. Kleberg: Who was it?

"Mr. Brownlee: The legal department of the Office of Price Administration feels there are very serious legal doubts as to our ability to defend this action without any action on our part.

"Mr. Kleberg: Did the court intimate that?

“Mr. Brownlee: I can’t answer that, sir.

“Mr. Kleberg: How would you arrive at any such definite conclusion?

“Mr. Brownlee: I think we have no alternative except to arrive at it through the best legal advice we can get from the attorneys for the agency. May I say, also, that the figures which we have ourselves would indicate that there was a very serious doubt as to its legality.

“Mr. Kinzer: Let me ask this question: Are these attorneys who now tell you you haven’t a leg to stand on, the same ones who drew the order and the regulations in the first place?

“Mr. Gilbert: That is right. [29]

“Mr. Hope: They have changed their minds since that time?

“Mr. Gilbert: The situation is just as clear as a bell, and it is not in our judgment, or in the judgment of anybody who has studied this problem, open to any real question. The price of livestock on the average, through the 9 months, the first 9 months of this year, was \$1.47 above the level that was necessary to cover the total cost of the non-processing slaughterer. Now, under those circumstances it can be demonstrated that as a class these people have been put into the red, and have been put into the red to the extent of 1½ cents per pound on what they slaughter.

“Mr. Kleberg: And under the law they must be left with an equitable amount of profit.

“Mr. Gilbert: That is right. It puts us under an affirmative obligation to provide a generally fair

and equitable margin for distributors. We have known for a long time, Mr. Chairman, that this situation existed.”

Now I will call Mr. Joseph.

The Court: What was the date of those hearings? Last summer, was it?

Mr. Agnew: This hearing is dated October 26, 1943, and he refers to the previous 9 months. [30]

O. B. JOSEPH,

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Agnew:

Q. Will you state your name, please?

A. O. B. Joseph.

Q. And what is your business, Mr. Joseph?

A. Meat packer.

Q. Do you hold any office with the defendant James Henry Packing Company?

A. I am president of the company.

Q. Do you hold any other position?

A. I am general manager.

Q. General manager and president?

A. Yes, sir.

Q. How long have you held those positions with that company?

A. I have been manager since about 1916. I have been president for about the last ten years.

(Testimony of O. B. Joseph.)

Q. And will you state generally the kind of business the James Henry Packing Company is in?

A. Well, we do slaughtering and curing—slaughtering up hogs and cattle and sheep, and making hams, bacon, lard and sausages.

Q. And where is your principal market for your products—in what locality?

A. The principal one is right around in the Seattle area and nearby. [31]

Q. You sell some in other cities besides Seattle?

A. Yes, we ship over east of the mountains as far as Yakima, and up as far as Blaine, Washington.

Q. About how many employees are employed by the James Henry Packing Company?

A. Well, right around a hundred at the present time.

Q. Now you are familiar with the stipulation that has been filed in this cause? I believe you looked it over before it was filed.

A. Yes, sir.

Q. And attached to that stipulation are twenty-five leases and twenty-five contracts of employment. Did you execute those?

A. Yes, I did.

Q. In what capacity?

A. As president of the company.

Q. And I will ask you whether or not your acts in that respect was authorized by your Board of Directors?

A. Yes, sir, it was.

Q. After you entered into those agreements, what if anything was done relative to giving

(Testimony of O. B. Joseph.)

instructions to the employees under those employment contracts?

A. Well, I wrote them all a letter, instructing them to be very careful of their prices and not to get any over the ceiling prices.

Q. The Bailiff will hand you what has been marked for identification as Exhibit A-1. State whether or not that is a copy of a letter sent to each of the twenty-five employment managers?

Mr. Hughes: By the term "employment managers" [32] you mean the Lessees?

Mr. Agnew: Lessees?

Mr. Smith: Lessors.

Mr. Hughes: Lessors, I should say. Lessors?

A. Yes, sir, this is a copy of the letter.

Mr. Agnew: We offer this letter, Your Honor.

Mr. Hughes: No objection.

The Court: It will be admitted.

(Whereupon copy of letter dated July 23, 1943, to Mr. Val Sonntag was then received in evidence and marked Defendant's Exhibit A-1).

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-1

Same letter sent to all managers upon signing Lease and Agreement.

July 23, 1943

Mr. Val Sonntag
Manager, Market No. 1
2305 Eastlake Ave.
Seattle 2, Wash.

Dear Mr. Sonntag:

In the operation of our markets we intend to comply fully with the Emergency Price Control Act of 1942, and all rules and regulations issued thereunder, and we wish you to be particular to pay no more than current ceiling prices in purchasing meats and charge no more than current ceiling prices in selling.

We also intend to comply fully with Executive Order No. 9250 and rules and regulations issued thereunder by the Economic Stabilization Director with reference to wages and salaries paid employees. Employees must not be given increases or new help hired at increased wages or salaries. When it becomes necessary to consider such matters, we will make appropriate application for the approval of the National War Labor Board.

We know it is unnecessary to call your attention to these matters as we do not anticipate any violations, but because of our recent acquisition of the

(Testimony of O. B. Joseph.)

market, it seemed timely to make some reference to it.

Yours very truly,

JAMES HENRY PACKING CO.

By O. B. JOSEPH

President

OJ:JE

Mr. Agnew: I will read the contents at this time (reading Defendant's Exhibit A-1).

Mr. Hughes: Pardon, what is the date of that letter?

Mr. Agnew: July 13th, 1943.

Q. Did you prior to this time operate a retail market at all, Mr. Joseph?

A. Yes, we have one retail market we have owned for many years.

Q. And where is that located?

A. That is on Western Avenue and Marion Street.

Q. Now, what merchandise did you deliver to your markets—what sort of merchandise?

A. Oh, we delivered a full line, with the exception of veal, hams, bacon, lard, sausages, beef, pork.

Q. Did you send invoices covering that merchandise?

A. Oh, yes, we always made a record of everything.

Q. At what price did you put it?

A. The ceiling prices. [33]

(Testimony of O. B. Joseph.)

Q. Wholesale?

A. Wholesale ceiling prices, yes, sir.

Q. Did you bill any of these twenty-five markets any different from the one you previously had owned?

A. No, always the same.

Q. Followed the bookkeeping—

A. The same procedure.

Q. Did you prepare anything by way of forms for reports to be rendered by your retail markets?

A. Yes, sir, I did.

Q. Did you have those printed?

A. I did. I had them printed.

Q. I will ask you over what period were those reports supposed to be turned in, daily, weekly, or monthly?

A. Well, they were turned in usually weekly. It is a daily report of the sales, but turned in weekly.

Q. Do I understand that correctly, that each of these written ones would be a daily report, but they would turn in all of them weekly?

A. Weekly, yes, sir.

Q. I will hand you what has been marked A-2 for identification and ask you if that is one of the printed forms that you had printed for that operation?

A. It is, yes, sir.

Mr. Agnew: We offer this in evidence.

The Court: Is there any objection?

Mr. Hughes: No objection.

The Court: It will be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon printed form referred to was received in evidence and marked Defendant's Exhibit A-2). [34]

DEFENDANT'S EXHIBIT A-2

Market Sales

Daily Report

Date.....

Cash

Credit

Total

Market

By

10M 7-43 AEFCO.



Q. What about the question of the signs on the exterior of the markets, did you make any change in them or——

A. Well I had signs ordered for all of the markets, but they had not been completed up to the time that we started in to cancel these leases.

Q. That is, you stopped the operation before actual delivery of the sign? A. Yes, sir.

Q. But you had had them ordered?

A. I had had them ordered and they were nearly finished.

Q. What kind of signs were those?

A. Well, it was a sign about four feet long and about eighteen inches wide.

(Testimony of O. B. Joseph.)

Q. What did it say on it as to the ownership?

A. "James Henry Market No." so and so.

Q. And you had each market—

A. Numbered from 1 up.

Q. You had each market numbered?

A. Yes.

Q. Now to get back to the reasons behind your going into the retail business, Mr. Joseph, will you just state briefly to the Court why you wanted to go in the real estate business, or why you did, and how it came about, and what happened?

Mr. Hughes: Retail—you said "real estate".

Mr. Agnew: Retail business.

A. It wasn't through any solicitation on our part that we got into the retail markets, but there was a tremendous shortage of meats of all kinds at that time, and many of the markets here in this city closed up. Quite a [35] number of people came to me and said that as long as some others had markets there, why couldn't we arrange to take over their market, as they wanted them to be kept intact and did not want to have to close them. I thought it over for a while, and then consulted our counsel to see whether it could be done legally, and if so, how it could be done, and from that, our attorney then drew the lease for me and a contract of employment for these men.

Q. Did you, before proceeding with this, take the matter up with any officers of the O.P.A.?

A. Not until after the first lease was drawn up.

(Testimony of O. B. Joseph.)

Then our attention was called to it by the O.P.A. and Mr. Smith and I went up to see them.

Q. Do you remember about the date the first conference at which you were personally present, occurred?

A. Well, I really don't. I really couldn't give you the dates on that, Mr. Agnew. I don't have them.

Q. Well, with reference to the dates of these original leases that were signed, now was it before or after those were signed—the forms that were finally signed up?

A. It was before they were signed up, the last ones.

Q. I will ask you whether your first leases are in the same form that is shown by the stipulated leases and employment contracts now?

A. No, they were different.

Q. Were you present at the time the first form was taken up with any officials of the O.P.A.?

A. Yes, sir, I was. [36]

Q. Who was present at that time?

A. Well, there was Mr. Hartson and Mr. Sholley, and I don't recall, I think there was someone else there, and Mr. Smith and myself.

Q. Well was there any complaint made to you or in your presence by the officials of the O.P.A. as to the form of that lease at that time?

A. It had a paragraph in there that—or a provision that upon 30 days' notice the lease could be cancelled by either party.

(Testimony of O. B. Joseph.)

Q. And what was stated about that?

A. Well, they did not think that that——

Mr. Hughes: Just a minute.

Q. Who made the statement?

A. Mr. Hartson.

Mr. Hughes: Just a moment. I think, Your Honor, we are getting into deep water here, and this witness is attempting to testify from hearsay without at least laying any foundation for such testimony. I therefore object to it at this time.

The Court: I assume he is offering the testimony for the purpose of showing his good faith in this rather unusual transaction.

Mr. Hughes: Well, now, Your Honor please, in the first place the defendant has not pleaded good faith. There is no good faith pleaded in the answer—the affirmative defense, and I am at a loss to know wherein the good faith applies. Does it apply to his good faith as to his employees, or what is the good faith? In other words, it seems to me that those two [37] contentions, one of which he denies that he sold to these twenty-five employees, in on breath he denies he sold it to them as retailers, but he says he sold it—he gave it to them as their employees or turned it over to them as their employees. Now wherein does the good faith come in? I don't quite understand just what the defendant's contention is, as far as good faith.

The Court: I am taking the opening statement as made by counsel for defendant and from that I draw the inference, which seems to me to be the

(Testimony of O. B. Joseph.)

logical one, that had it not been for the O.P.A. regulations and the enactment of the O.P.A. regulations and the emergency that existed, the defendant would not have gone into the meat business as far as he did in these transactions, but it was for the purpose of meeting that situation and continuing the business—the retail business alive and having an outlet for his own product, and that because the modus operandi was being questioned by the representatives of the government, they were taken into consultation, because you have stipulated the facts that these things did occur, there were twenty-five markets and this type of lease, and this type of employment contract was entered into, and that the meat, excepting veal, was disposed of to the public through these markets, and that the substance of your stipulation goes so far as to say that the price that the packer got, the defendant in this case, was actually above the ceiling prices for wholesale.

Mr. Hughes: Yes, that is true, Your Honor, but it seems to me that his defense, and only defense [38] that he set up, is that these people are his employees. Now it seems to me that is the sole question for the Court to decide, are they his employees?

The Court: Well, I feel that I must give as wide an application as the facts will possibly warrant to the principal of that which would be just and equitable under an unusual and emergent situation, and I shall, insofar as the law and the regulations permit me, do that very thing, and I shall overrule your objection and allow you an exception.

(Testimony of O. B. Joseph.)

You may proceed.

Q. I think the question was, Mr. Joseph, as to what Mr. Hartson said relative to this first lease that was there. What criticism did he make of it if any?

Mr. Hughes: I understand Your Honor to overrule my objection, did I?

The Court: Yes.

A. He made objections to the provision of the cancellation there, the 30 day cancellation.

Q. What was said then relative to whether or not—as to your willingness to correct that by anyone, and if so, who said it?

A. Well then the argument was with our counsel and Mr. Smith in regard to a new lease. They talked over some provisions. I did not pay so much attention to that, as I left that matter up to him, but any way, we left and then a new lease was drawn up by counsel.

Q. Can you state the month that this was in?

A. Well, this was in July.

Q. And it was before the date of these new leases? [39]

A. Oh, yes.

Mr. Agnew: Can we agree as to what Mr. Hartson's official title was at that time?

Mr. Layman: Chief Attorney.

Mr. Agnew: Chief Attorney for the local office here?

Mr. Layman: Yes.

Q. After that conference, I will ask you whether or not there was a redraft of the leases?

(Testimony of O. B. Joseph.)

A. Yes, there was.

Q. Were you present at the time that redraft was taken to Judge Hartson?

A. No, I was not.

Q. And what you heard about that, then, was from your attorney? A. That is right.

Q. Did you then execute the present leases that are shown by the stipulation?

A. We did. They were all alike.

Q. I will ask you whether or not, in executing those, you followed the advice of Mr. Smith?

A. Oh, always, yes.

Q. Under the employees' agreement, who paid the expenses?

A. He paid the expenses of them.

Q. Would that include rent?

A. It included all expenses.

Q. And what was the compensation under the employees' agreement—what is his compensation and what was the company's share? What did you pay the man for running the market? [40]

A. We were to get ten percent of the gross sales, and he was to have all of the rest of the profit, and to take care of the expenses.

Q. Would that include rent?

A. That would include rent, as well.

Q. Did you take up the matter with your insurance company of covering these places with liability insurance? A. Yes, we did.

Q. At that time, immediately prior to these

(Testimony of O. B. Joseph.)

leases, I will ask you whether or not there was any ceiling price on livestock that you purchased?

A. No, there was not at that time.

Q. At the price you paid, was it possible to process the meat and sell it at one sixty-nine without loss?

Mr. Hughes: Just a moment, I object to that, if the Court please.

Mr. Agnew: It just goes to the reasons for going into the retail business.

The Court: Objection overruled, you may answer.

A. The question, again?

Q. The question was; was it possible at that time to buy livestock on the market and process it except at a loss?

A. No, it was not, no, sir.

Q. When was the next conference with the O.P.A. officials at which you were present?

A. I can't recall the date.

Q. I will ask you if you received any official notice from the Office of Price Administration in which they advised you that they were ruling that your arrangement was [41] improper?

A. Yes, I did receive it. (paper handed to witness) Yes, sir, I received that.

The Court: Do you offer that in evidence, Mr. Agnew?

Mr. Agnew: I now offer it, Your Honor.

The Court: Any objection?

Mr. Huges: No objection.

(Testimony of O. B. Joseph.)

The Court: It will be admitted in evidence.

(Whereupon letter dated 8/30/43 to James Henry Packing Co. from O.P.A. was received in evidence, marked Defendant's Exhibit A-3, and read to the Court by Mr. Agnew.)

DEFENDANT'S EXHIBIT A-3

Office of Price Administration
3377 White-Henry-Stuart Building
Seattle 1, Washington
August 30, 1943

In Reply Refer To: 21,063 AVS:HJ

James Henry Packing Company
2025 Airport Way
Seattle 8, Washington
Attention: Mr. Joseph, President

Gentlemen:

Judge Hartson and Mr. Sholley have referred to this department for action the matter involving your leasing of retail outlets for meat products. The exchange of correspondence, and other material in the file including copies of your form lease and contract of employment, indicates the facts have been quite fully discussed, and no worthwhile purpose will be served by an extended repetition of them here.

Suffice it to say that in our opinion the effect of your lease-employment arrangement—and particularly as exemplified in paragraph 3 of the "Contract of Employment" form, reading,

(Testimony of O. B. Joseph.)

3. "That during the term of his employment, second party shall properly manage said meat market, and for his services first party shall pay to the second party all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and ten per cent (10%) of gross sales."

—is for your firm to secure a higher price for its meat than is permitted by Revised Maximum Price Regulation 169.

The arrangement thus constitutes an evasion of the ceilings fixed in the regulation, and in our view must be terminated.

A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions.

Very truly yours,

R. C. FINLEY

Chief Enforcement Attorney

A. V. STONEMAN

Litigation Attorney

Q. I will ask you if you remember that you answered that letter? A. Yes, I did.

Q. I will ask you if that is a true copy of your answer to the letter that is being handed to you now? A. It is, yes, sir.

(Testimony of O. B. Joseph.)

(Paper handed to Mr. Hughes.)

Mr. Smith: Mr. Hughes, would you just as soon put in the original of that letter?

Mr. Hughes: This is all right, this copy of it.

Mr. Agnew: We offer this letter A-4, a copy of the letter sent.

Mr. Hughes: There is no objection.

The Court: It will be admitted in evidence.

(Whereupon, copy of letter dated 9/2/43 to OPA from Henry Packing Co. was received in evidence and marked Defendant's Exhibit A-4.)

DEFENDANT'S EXHIBIT A-4

September 2, 1943

Office of Price Administration
3337 White Henry Stuart Building
Seattle 1

21,063 AVS:JH
Attention Mr. Stoneman

Gentlemen:

Receipt is acknowledged of your letter of August 30, 1943, stating that our leases of retail markets and the contract of employment with the manager constitute an evasion of price ceilings fixed in Regulation 169.

I am referring your letter to our legal counsel, requesting advice and instructions on how to proceed

(Testimony of O. B. Joseph.)

to accomplish a cancellation of our leases and manager contracts.

Very truly yours,

.....

President, James Henry
Packing Co.

Q. I will ask you if you then further corresponded with the office of the O.P.A.?

A. Yes, we did.

Q. Handing you what has been marked as Exhibit A-5 for identification, I will ask you if the first page—what the first page of that exhibit is?

A. This is a letter addressed to Mr. A. V. Stone-
man, Litigation Attorney, Office of Price Adminis-
tration.

Q. Did you send the original of that?

A. Yes, sir, I did.

Q. And attached to that is a letter. To whom was that letter sent?

A. It says a copy of our letter to the managers is enclosed.

Q. Did you send one of those letters to each manager, which you enclosed? A. I did, yes.

Mr. Hughes: No objection.

Mr. Agnew: Offer it in evidence, Your Honor.

The Court: Any objection?

Mr. Hughes: No objection.

The Court: It may be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon, letter dated 9/24/43 to O.P.A. from Henry Packing Co., with attached copy of letter referred to, was then received and marked Deefndant's Exhibit A-5.)

DEFENDANT'S EXHIBIT A-5

September 24, 1943

Mr. A. V. Stoneman,
Litigation Attorney,
Office of Price Administration
3337 White Henry Stuart Bldg.,
Seattle 1, Washington

Dear Sir:

Please refer to your letter of August 30, 1943, with reference to the employment of Managers for this Company's retail markets.

Pending our protest and appeal of the regulation and your interpretation, we are relinquishing all profits from retail sales of beef and veal furnished by us, and are instructing our Managers accordingly.

A copy of our letter to Managers is enclosed.

Very truly yours,

JAMES HENRY PACKING CO.,

By

President

OJ/t

(Zone #4)

Dear Sir:

The Office of Price Administration has adopted

(Testimony of O. B. Joseph.)

an amendment to its Revised Maximum Price Regulation 169 reading:

“Any transaction, device or arrangement whereby a person who sells, transfers or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited.”

Local attorneys for the Office of Price Administration have advised us that, in their opinion, with respect to beef and veal furnished by us, the terms of our employment of you as Manager constitutes an evasion within the meaning of the amendment.

You will, therefore, in reporting receipts for the purpose of determining your commissions, omit or deduct all receipts from sales of beef and veal furnished by us.

Very truly yours,

JAMES HENRY PACKING CO.,

By

OJ/t

President.

Mr. Agnew: I will read the letter (Exhibit A-5 was then read.)

Q. I will ask you if from that time on there was a reduction made in the percentage?

A. Yes, there was. [43]

(Testimony of O. B. Joseph.)

Q. How was it figured, Mr. Joseph?

A. Well, after consulting a number of the markets as to what they thought was the amount that they would receive from beef that we furnished to our markets, and that in figuring their returns to us we took 70 percent of the 10 percent that the contract called for, thereby eliminating any receipts from beef. There were two of them. One of them that figured—that is beef sales, would run as high as 50 percent, so we had him discount his then to 50 percent of the 10 percent; and another one that figured that, his beef sales would be around about 40 percent, so we had him to eliminate the 40 percent and pay us 60 percent of the 10 percent. We were doing this in order to comply with this regulation.

The Court: You notified the O.P.A. of the arrangement?

A. Yes we did.

Q. Did you receive any written response and acknowledgment of that notice from the O.P.A. (handing witness paper)? I will ask you a different question, if this exhibit A-6 for identification is that written response?

A. Yes, sir, this is the letter we received.

Mr. Agnew: I offer 6, Your Honor.

The Court: It will be admitted in evidence.

(Whereupon, letter dated 10/4/43 to Henry Packing Co. from O.P.A. referred to was received in evidence, marked Defendant's Exhibit A-6, and was read to the Court.)

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-6

Office of Price Administration
3337 White-Henry-Stuart Building
Seattle 1, Washington

October 4, 1943

In reply refer to 21,063 AVS:HJ

James Henry Packing Company
2025 Airport Way
Seattle 8, Washington
Attention: Mr. Joseph, President

Gentlemen:

With reference to your letter of September 24, transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal, mentioned in your form letter, are still being made by these markets.

Very truly yours,

R. C. FINLEY

District Enforcement
Attorney

A. V. STONEMAN,

Litigation Attorney

Q. Did you answer that letter?

A. I did, yes, sir.

(Testimony of O. B. Joseph.)

The Court: Have you the original of it? [44]

Mr. Agnew: I seem to have a copy here, but it is not a carbon. That seems to be a copy but I am not sure that it is a true carbon. We could agree on it in case you have the original.

Mr. Hughes: Let's see. Yes, that is right, it is dated October 11, 1943. You might write in there "1943".

Q. Handing you Exhibit A-7 for identification, I will ask you whether or not that is a true copy of the answer that you sent the O.P.A. office, to their letter? A. Yes, sir.

Q. Now I will ask you, Mr. Joseph, whether or not on——

Mr. Agnew: Oh, pardon me, withdraw that question.

Offer A-7.

Mr. Hughes: No objection. I wish the record would show that was dated October 11, 1943.

The Court: It will be admitted in evidence.

It seems to be October 11th, yes.

(Whereupon, letter dated 10/11/43 to O.P.A. from Henry Packing Co. was received in evidence and marked Defendant's Exhibit A-7.)

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-7

October 11, 1943.

Mr. A. V. Stoneman
 Litigation Attorney
 Office of Price Administration
 3337 White Henry Stuart Building,
 Seattle 1

Dear Sir:

Answering your letter of October 4, 1943 (21,063 AVS:HJ), please be advised that we have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943.

Very truly yours,

JAMES HENRY PACKING CO.,

By

President.

Q. Following that, I will ask you whether or not you had any conference with the O.P.A. officials on November the 2nd as to whether this arrangement of deducting a percentage on beef and veal was satisfactory to them? A. Yes, we did.

Q. And will you state who was present?

Mr. Hughes: What date was that, pardon me?

Mr. Agnew: November 2nd. [45]

Q. If you remember.

A. I just couldn't say. I don't just recall.

(Testimony of O. B. Joseph.)

Q. Was Mr. Smith with you?

A. Yes, he was.

Q. I will ask you whether or not as a result of that conference there, if on the same day you wrote a letter requesting cancellation of all these contracts from all of the markets?

A. Yes, I remember we wrote a letter asking for cancellation of all the markets.

Q. Did you send that letter to each of the 25 markets? A. Yes, sir.

Q. I will ask you whether or not Exhibit A-8 for identification is a true carbon copy of the letter sent to the 25 markets? A. Yes, it is.

Mr. Agnew: We will offer it.

Mr. Hughes: That was sent to the markets?

Mr. Agnew: To each of the markets, yes, sir. I would like to substitute A-8 for identification, and mark a better copy of A-8.

The Court: You may.

Mr. Hughes: That is all right.

The Court: I don't have any objection.

Q. What has now been marked A-8, dated November 2, addressed to Val Sontag, is your testimony the same in regard to that as the last exhibit? A. Yes.

Q. A better written copy? A. Yes, sir.

Mr. Agnew: We offer this in evidence.

The Court: It will be admitted in evidence.

Mr. Hughes: No objection.

(Whereupon, copy of letter dated 11/2/43 to Val Sontag from Henry Packing Co., referred

(Testimony of O. B. Joseph.)

to, was then received in evidence and marked Defendant's Exhibit A-8.)

DEFENDANT'S EXHIBIT A-8

No. 1

November 2, 1943

Mr. Val Sontag,
2305 Eastlake Ave.,
Seattle, Washington.

Dear Sir:

The Office of Price Administration seems determined to view our lease and our employment of you as market manager as a transaction not sanctioned by Government price regulations.

I disagree with the O.P.A. There is nothing in our lease and agreement which violates price ceilings. On the contrary, the arrangement is beneficial to all concerned and provides a method for the distribution of more inspected meats, with no extra cost to your customers.

However, I fully appreciate the necessity of price regulations and the efforts of the OPA to prevent inflation, and I believe you will agree with me that all business should cooperate with the OPA, even though we may disagree with its methods and rulings, and I am respectfully asking you to agree to a mutual cancellation of our lease and contract of employment as of the end of November 1, 1943.

I hope that following the cancellation of our lease, you can resume the operation of the market,

(Testimony of O. B. Joseph.)

and we wish to assure you that you may depend upon our sincere cooperation.

Very truly yours,

.....

President, James Henry
Packing Co.

OJ/t



Q. I notice in this letter, Mr. Joseph, you ask, although it is dated November 2nd, you ask them for cancellation as of November 1st, in the body of the letter. A. Yes, sir.

Q. Was that done with—and then, after November 1st, the arrangement was discontinued as to all markets? A. That is right.

Mr. Agnew: You may cross examine.

Cross Examination

By Mr. Hughes:

Q. Mr. Joseph, at the time these instruments which you denominate “lease and contract” were made, the furniture and fixtures in those retail stores belonged to these 25 different retailers, did it not? A. I think they did, yes, sir.

Q. And was there any allowance made for the furniture and fixtures in those stores, in your lease?

A. No, there was no arrangement.

Q. Now, I think eight of these 25 markets owned their own premises. I don’t know whether Mr. Smith has told you that—the attorney, but he states eight of them. Do you know? [47]

(Testimony of O. B. Joseph.)

A. A number of them. I don't know just how many.

Q. Some of them owned their premises and others leased them?

A. That is right.

Q. All the rent, that was due the owner of these premises was paid by the retailer, was it not?

A. They were to be paid by the people that we hired there, yes.

Q. It was paid by these retailers, is that correct? A. That is right.

Q. And no rent was paid by you to any of the owners of these premises, is that correct?

A. Well, we didn't because that would only be just a duplication of work. If I paid it they would have to give it back to me.

Q. But that was paid by the retailer for you, you claim? A. That is right.

Q. But you never paid the retailer any rent under your lease-contract with him, did you?

A. No, we did not.

Q. Well, why wasn't that done in accordance with the lease?

A. Well, it would only be a duplication of work if I paid him the rent. Then under his contract with me he would have to turn around and pay it back to me again, so——

Q. Well, under your contract arrangement it does not read that way, does it? Your lease says that you will pay each one of them the stipulated sum mentioned in the stipulation, does it, what is set out?

(Testimony of O. B. Joseph.)

A. That was in there for our protection. [48]

Q. That was an asset to the lessee, wasn't it, the retailer? A. Asset?

Q. Yes. It was an account receivable for him, wasn't it?

A. No, it would not be an account receivable.

Q. In other words, that was put in there — it didn't mean anything? A. Oh yes, it did.

Q. Well, when did you pay any of these retailers any rental for the premises that you agreed to pay under your lease?

A. I was just trying to explain to you that if we paid it to them they would have to turn around and pay it back to us. If you want to know the reason we put it in there——

Q. Yes. I would like to know the reason why you put it in there, too.

A. All right. That was only for our own protection in case one of these fellows fell down or he left and we would have to hire somebody else, or supposing one of them would run away and we would have to put somebody else in charge of the market we wanted to protect ourselves, to know how much we would be obligated in the rent.

Q. Well, the fact that the——

A. It was just a matter of business.

Q. The fact that the retailer paid his rent due to the owner of the premises had nothing to do with the the rent you owed him under your lease, did it? Those are two separate transactions, weren't they?

(Testimony of O. B. Joseph.)

A. Oh, I don't know what he had to do with the owner of the [49] building.

Q. Well, if he had to pay the owner of the building rent—

A. There might have been a lot of other conditions outside of the meat market.

Q. But the fact remains that you never paid any rent or gave up any consideration for this lease as mentioned in the lease itself?

A. We gave up any consideration?

Q. Yes, what did you do to take care of the monthly payments provided for in the lease, to the retailer?

A. Why, we furnished these markets with a very good supply of meat, and give them a chance to do some business, and a chance to make some money.

Q. Well the fact remains, I say that you never paid them anything under your lease?

A. As I say, we didn't pay any rent, no.

Q. Yes. Now, how did you come to fix the amount at 10 percent? Pardon.

Mr. Hughes: I will withdraw that.

Q. How did you fix the amount of the rent in these leases?

A. Oh, just a legitimate rent for their markets, is all.

Q. It isn't the same that they pay the owners of those who are leasing, is it?

A. It might not have been the same.

(Testimony of O. B. Joseph.)

Q. It was an arbitrary figure you put in the lease. It didn't mean anything? A. Oh, yes, it did.

Q. Well, you didn't figure at all in—it does not figure at all in your accounting.

A. If I were obliged to take that market over and put [50] somebody else in there, I would want to know how much I would be obligated for the rent.

Q. I say, but it didn't enter into your accounting with the retailer in any way?

A. No, it did not enter into the accounting.

Q. Were any of these leases filed? Of these 25 leases you had executed, did you file any of them with the County Auditor?

A. No, I did not.

Q. Would you ever do that if you leased premises? Is it usual for you to do that?

A. I don't know whether it is customary or not.

Q. These retailers who were renting from their owners, did you get permission from the owners of the property to make these leases with the tenants? A. No, I did not.

Q. You did not. Did you give them any notice that you had sub-leased these premises?

A. No, I did not.

Q. Wouldn't you do that ordinarily if you made a lease for a business property, find out something about the ownership, how much rent he was paying?

A. Well, that would depend upon what the conditions were, I suppose.

Q. You did not even enquire whether the rent you

(Testimony of O. B. Joseph.)

fixed was the same that the lessee was paying, you say? A. No, I did not.

Q. That did not bother you at all, then? That did not enter into your calculations at all? [51]

A. No.

Q. That you considered immaterial?

A. That is immaterial, yes, so far as between he and I.

Q. Now referring to this contract that you call a contract of employment. Did you give these retailers any other notice than you have just offered in evidence here? A. Any other notice?

Q. Any other instructions, I mean.

A. No.

Q. Concerning the management?

A. Oh, I talked to them at different times, yes, but this is the only written ones that I give—written notices.

Q. This is the only uniform instructions that you have given all of them?

A. Yes, sir, that is the only uniform—

Q. Have you given them any instructions in addition to this, as to the management I am speaking of now.

A. I don't remember of any particular case, no.

Q. Have you given them any instructions as to the books of account to be kept, and the records?

A. Oh, yes.

Q. That was the written instructions you just introduced in evidence?

(Testimony of O. B. Joseph.)

A. No, but we sent them these blanks. We furnished all of them with these blanks.

Q. That is the daily record blanks?

A. Daily record blanks.

Q. That has been introduced in evidence. Is there anything else you have given them? A. No.

Q. Instructions about books of account, and records? A. No.

Q. Did you ever authorize them to obligate themselves in any way during this four-months' period from July 1943 to November, 1943?

A. Oh, I gave them——

Q. Outside of what has already been introduced?

A. Yes, but I gave them permission to make purchases at other places, too.

Q. You gave them permission—how did you give that permission? A. How? Verbally.

Q. Well, did you see each one of them?

A. Oh, yes, I have talked to all of them.

Q. And told them to buy whatever they thought they should have?

Mr. Smith: I think Your Honor should refer to the contract, Exhibit "B". There is no use trying to modify that and change that. If Your Honor will read that contract you will see how all this will be done. No instructions were necessary. Those were the instructions.

The Court: Objection will be overruled, exception allowed.

Q. Is that correct? A. That is correct.

Q. Have you given them any other instructions about their obligations?

(Testimony of O. B. Joseph.)

A. Not that I remember of.

Q. Did they get permission from you to incur obligations [53] in buying poultry and fish?

A. Yes, they did.

Q. When was that instruction given?

A. Whenever—at the same time I would tell them whatever they needed that we didn't have, to go ahead and buy it.

Q. Just go ahead and buy it? A. Yes, sir.

Q. Just as they had always been doing?

A. Just the same.

Q. And did you have anything to do with the help—the hiring? A. No.

Q. Hiring and firing of the help?

A. No, sir.

Q. Of the salaries? A. No.

Q. And these markets made no reports to you on their obligations, did they? A. No.

Q. So that you don't know whether they paid all the bills or not, do you?

A. I would have known if they hadn't.

Q. They bought it in their own name, didn't they?

A. Bought it in the name of the market, yes.

Q. Yes, and any bills would go to the market, wouldn't they. All bills went to the market?

A. Yes.

Q. How would you know?

A. How would I know? Well, if they are not paid, why I [54] would hear from it.

(Testimony of O. B. Joseph.)

Q. Well, how would you know?

A. How would I know? Well, they would be coming back to me for it.

Q. Who would?

A. Whoever they owed it to.

Q. How would they know you had anything to do with the market?

A. Oh, they all knew.

Q. Who knew it? A. Everybody knew.

Q. You never gave any notice to the public about this, did you?

A. No, but the dealers knew it.

Q. You never notified the public in any way of the change of the proprietorship in these markets, did you? A. No.

Q. When did you order these signs that you refer to?

A. I just don't recall the date. I could get it for you, though, from the Foley Sign Company.

Q. From what sign company?

A. Foley Sign Company.

Q. Had they made these signs?

A. They had them nearly all completed, yes.

Q. Now, Mr. Joseph, was there a shortage of pork on July the First, 1943?

A. There was a shortage of all kinds of meat along at that time.

Q. Are you sure there was a shortage of pork?

A. Yes. [55]

Q. Did these 25 retailers have any notice of any shortage of pork?

(Testimony of O. B. Joseph.)

A. Did they have notice of it?

Q. Yes.

A. Well, they would certainly know if it was short, yes.

Q. Well, didn't they get all the pork they ordered and wanted prior to July the First?

A. I don't think they did, no, sir.

Q. You don't think they did? A. No, sir.

Q. You know they didn't get the beef that they wanted, don't you? A. Yes, sir.

Q. And you know there was a scarcity of beef around July the First, don't you?

A. Well, there was a great scarcity of all meats.

Q. Wasn't the beef primarily the reason why you made these contracts?

A. Not particularly, no.

Q. How is that?

A. Not particularly beef, no.

Q. Have you got the figures on the pork that you sold these 25 retailers during June, 1943, as compared with July, 1943?

A. Why, I could find it.

Q. You could find it? A. Yes.

Q. And would you say it was less in June than in July, or more?

A. Well, I wouldn't say without checking it. [56]

Q. Well, if you say there was a shortage of pork it would necessarily be less, would it?

A. Not necessarily. We can sell them the same amount and still be short.

(Testimony of O. B. Joseph.)

Q. Well, if they were satisfied in July and were not in June that would be evident, wouldn't it, that they were short in June and not in July?

A. I couldn't say whether they would be satisfied or not.

Q. Well, take for instance the month of June, 1943, as compared with June, 1942, do you know whether your pork was greater or less?

A. I couldn't recall from memory.

Q. You don't? A. No, sir.

Q. Could pork be handled at a profit in June of 1943?

A. I don't—I can't remember what the records are on it.

Q. You know about beef?

A. I do know about beef.

Q. What?

A. I do know about the beef, yes.

Q. You don't know whether pork was or not?

A. I can't recall.

The Court: Well, pork is not involved in these calculations.

Mr. Hughes: I am trying to show there was a shortage of pork, that is all.

Q. Now these invoices you furnished each of these 25 markets were invoices on every shipment that was made to them, didn't you?

A. There is an invoice that goes with every shipment, yes, [57] sir.

Q. That was done prior to July and subsequent to July, 1943? A. Yes, sir.

(Testimony of O. B. Joseph.)

Q. And those invoices were made out just alike in July, August and September, and October. They were made out the same as they were previously, weren't they?

A. Just the same. There was no change.

Q. Now, did you have a license from the City of Seattle to operate these retail markets?

A. Well, we have a license from the City of Seattle, a wholesale license.

Q. A wholesale license, but did you have a retail license to operate these 25 meat markets from the City of Seattle?

A. No, personally we did not.

Q. Did you have any license from the State of Washington to operate these retail meat markets?

A. No, they don't require any.

Q. What is that?

A. I don't think they require any.

Q. You don't think they do? A. No.

Q. And you gave no notice to the public of these leases, did you? A. No, I did not.

Q. Did you apply to the State of Washington for a certificate of registration for the State tax—for the occupation tax? A. No, I did not.

Q. You did not? [58] A. No.

Q. For any of these markets?

A. No, sir.

Q. You never paid any tax to the State for the operation of these retail markets? A. No.

Q. Never made any report to the State on the operation of these markets?

(Testimony of O. B. Joseph.)

A. No, I have not.

Q. Why didn't you do that? A. Well—

Q. You know if you own a retail business you have got to report to the State, don't you? You have got to obtain a license to do business—business and occupation tax? You never did any of those things?

A. No, I never have.

Q. Did anybody else do it to your knowledge?

A. I don't know, I am sure.

Q. As president, you would know, wouldn't you?

A. No, there are many things that are done that I don't know.

Q. In other words, Mr. Joseph, there is no change in the operation of this store after July the First, than before July the first, was there, as far as you know?

A. Any more than that they were supplied well with good meats.

Q. Yes, and you received the ceiling prices for all your meats delivered to these markets for the life of these contracts, didn't you?

A. Yes, sir, we did. [59]

Q. You received in addition to that 10 percent of their gross sales, is that correct?

A. Part of the places we got 10 percent, and some—

Q. You got 10 percent of the sale of all the meats? A. Everything that was sold.

Q. In the meat market? A. Yes, sir.

Q. That included poultry and fish?

(Testimony of O. B. Joseph.)

A. Whatever sales were made in the meat market.

Q. You never supplied them with any poultry or fish, did you? A. No.

Q. Well, now, what additional service did you render to the market after July the First that you did not give them before July the First, 1943?

A. Well we furnished these markets with a much better grade of meats than we did before. We shipped in a lot of cattle from the East, from Denver—high grade stuff that we furnished there, trying to build up their business.

Q. That is the only additional service that you gave?

A. Yes, and furnishing them more meats, of course.

Q. More meats. Now, the amount that you received over the ceiling price was \$19,149.64, is that correct?

A. No, that is not correct. We did not receive anything over the ceiling price.

Q. Well you received \$19,149.64, then, after you received the ceiling price?

A. We received a profit for the operation of the retail markets. [60]

Q. Did you receive \$19,149.64 from these 25 markets?

A. I think that is about the amount.

Q. And did you receive the ceiling price of all the meats you sold these markets?

A. Yes, we did, yes, sir.

(Testimony of O. B. Joseph.)

Q. What was the consideration for that \$19,149.64?

A. Well, the taking over and the management of these markets, and furnishing them with good meats and plenty of it.

Q. Plenty of meats, and that was the purpose of this lease and contract? A. Yes, sir.

Q. You told these markets, didn't you, somewhere around the latter part of June that you couldn't afford to sell at the ceiling prices?

A. I don't know that I made any such statements as that to them.

Q. Well, what did you tell them? Just what was the conversation you had?

A. We just didn't sell them but very little, and we sold inferior meats.

Q. Well, who brought up this question of the lease and the contract? Who suggested that?

A. The different market owners.

Q. You did not suggest it?

A. No, they came to me. I did not go to them.

Q. And is that true with Mr. Mulholland and Mr. Blunden, and everyone of them you say suggested it to you? A. They came to me.

Q. They came to you, and you did not go to them? [61] A. No, I did not.

Q. Well, what did you tell these markets you would be willing to do? What, briefly, did you tell them?

A. Well, I told them that I had taken this up with out attorney and this is the suggestion that he

(Testimony of O. B. Joseph.)

had, and that I had made one or two leases on this basis, and they wanted to come in on it. There was many people that wanted us to take their markets over, but I could take only a certain number, and then if you will notice the ones that I did take over were scattered around all through the city, at strategic points, so as to give the public really an opportunity to buy something.

Q. Now I forgot to ask you about this contract of employment that you have with these retailers. Did you pay any social security tax for any of those managers? A. No, I did not.

Q. You never had any social security card or any form at all, as an employee of yours?

A. No.

Q. Can you tell us why you did not have that detail?

A. Well, they weren't working on a salary.

Q. Well—

A. They were working on a commission.

Q. Well does that make any difference?

A. I really don't know.

Q. You never enquired about that?

A. No. Maybe you would know more about that than I do.

Q. Didn't you tell these retailers that you couldn't let them have any more meat unless they made a contract—this contract and lease? [62]

A. Oh, no.

Q. Didn't you tell them you could not supply them with meat? A. No, no.

(Testimony of O. B. Joseph.)

Q. Well, why make this contract?

A. Because we were giving them a very small amount—we were doing as little as we could and giving cheaper meats.

Q. You told them you could supply them with plenty of meat if they signed the contract and lease. What did you tell them? What was the motive?

A. Well, if we took the markets over we would see that it was well supplied, just like any other business venture when you are taking over a business, why, you want to see that it goes.

Q. In other words, you told them in effect that you couldn't supply them with meat unless some other arrangements were made, is that correct?

A. We couldn't supply them with the quantity that they would want.

Q. But you would supply them with the quantity they wanted if they signed the lease and contract, is that right? A. That is right.

Q. Now you say in August or September you changed this from 10 percent to 7 percent, except as to two of them I believe you said. Lindquist and Brown, for instance, you reduced from 10 to 6 percent. Did Mr. Lindquist go to you and tell you that he thought it was very unfair and he should not pay you? A. No. [63]

Q. That much?

A. No, he did not. I went out to see him when we had this notice about the beef.

Q. Uh-huh?

(Testimony of O. B. Joseph.)

A. And asked him what in his judgment was the amount of his sales for beef that was furnished by us, and he thought it was about 50 percent, so I said, "Well, then, you will eliminate the 50 percent and you will pay us 50 percent of the 10 percent."

Q. And Mr. Blunden?

A. Mr. Blunden, he figured about 40 percent, and so I told him "then you will eliminate the 40 percent."

Q. As a matter of fact—

A. "And pay us sixty percent of the ten percent."

Q. As a matter of fact, Mr. Joseph, Mr. Blunden came to you about that percentage?

A. No.

Q. He is the one who complained, isn't he?

A. No, he never did, no sir.

Q. Now this 10 percent was figured on total gross sales, you say? A. Yes, sir.

Q. That included credit as well as cash?

A. Sales, all sales.

Q. All sales, and if they had customers that they trusted, they had to pay you the 10 percent, regardless of whether they collected it or not, is that correct? A. Yes.

The Court: Now let me interrupt here. Was that just for meats or was that for everything they [64] sold?

A. Everything that was sold in the meat market.

(Testimony of O. B. Joseph.)

The Court: But some of these businesses were combination businesses, weren't they?

A. Yes. It had nothing to do with it, only the meat market. Most of them have groceries too, but this had nothing to do with that. This was just for the markets.

The Court: I think we will take the afternoon intermission now.

(Recess)

Q. Mr. Joseph, referring to Defendant's Exhibit A-1,—pardon me, that should be A-2, I mean. That is the daily report of market sales?

A. Yes, sir.

Q. Was that prepared by these meat markets? They made out these daily reports? These were furnished you every day, were they, by the meat market?

A. No, usually once a week.

Q. Once a week? A. Yes, sir.

Q. Did they also give you the daily report?

A. No, some of them just made them up on a weekly—

Q. I see, and you did not check? A. No.

Q. Just took their word for it? A. Yes.

Q. And this requires them to account for the cash as well as the credit? A. Yes, sir.

Q. And the name of the market, by so and so, is printed on there. Now referring to Defendant's Exhibit A-3, which was a letter written by Clinton A. Hartson, Chief Attorney by John G. Sholley, District Attorney, dated July 30, 1943, it says:

(Testimony of O. B. Joseph.)

“You will recall that early in July you and Mr. Smith called at our office and conferred with Judge Hartson and me with respect to the validity under the Revised Maximum Price Regulation 169 of certain proposed transactions, whereby you would lease a number of retail meat markets in the City of Seattle. At that time we advised you that the leasing arrangement first prepared by Mr. Smith would be illegal under Revised Maximum Price Regulation 169. Mr. Smith then prepared sample documents consisting of a lease and a contract of employment which were submitted to this office for consideration.”

Now, were those, the leases and contracts that were signed?

A. The ones that he submitted later, yes.

Q. Yes, and he says:

“We referred copies of these documents to our San Francisco office for their opinion.”

Those were the ones that were signed?

A. Yes, sir.

Q. Now he enclosed the letter and said:

“In view of the expression of policy [66] on the part of our National Office—this office now is of the opinion that the proposed leasing arrangements between James Henry Paeking Company and various retail meat markets in the City of Seattle are forbidden evasions of Revised Maximum Price Regulation 169.”

What did you do after you received that letter of July 30, advising you that they were an evasion?

(Testimony of O. B. Joseph.)

A. Referred it to our attorney.

Q. Then what was done?

A. Well, he handled it. I will let him testify.

Q. You don't know what happened after that?

A. Well, I don't remember. The correspondence there, you will see what——

Q. Well, that was July 30th, and after you were told it was an evasion, you kept the contracts going until November the 1st?

A. May I see the letter?

Q. Yes. It is Exhibit A-3 (exhibit handed to witness).

A. This don't—this isn't the same as you are talking about.

Q. Oh, isn't it? Pardon me, I thought I had a different copy. This is August the 30th. It is July 30th. I must have the wrong date here. Oh, I have. I marked that date. This one should be three. I wish you would strike that. That was a mistake.

Well, I still hand you A-3. That letter is dated August the 30th, 1943.

A. Uh-huh.

Q. And he tells you there that it is forbidden by Price [67] Regulation 169, doesn't he? He says it constitutes an evasion of the ceiling prices fixed in the regulation, "and in our view must be terminated."

A. Constitutes an evasion of the ceiling prices, yes, sir.

Q. What did you do after August the 30th?

A. Well, he says a reasonable time will be al-

(Testimony of O. B. Joseph.)

lowed to effectuate the terminations of these contracts, so I referred it to our attorney.

Q. You referred it to your attorney?

A. Yes, sir.

Q. And what was done to cancel these contracts?

A. Well we asked to have them cancelled.

Q. You cancelled them on or about November the First?

A. Whatever the date of it. Whatever the dates of those letters are.

Q. Well you received this letter on August the 30th,—at least it is dated August 30th. I assume you got it in regular course and then on September 2nd, your Exhibit A-4 says that you are referring it to legal counsel for advice. What was done pursuant to that notice you received from the Office of Price Administration?

A. Well, I just don't recall. I think our attorney answered it.

Q. Well, as a matter of fact the record shows that you did nothing except finally on September the 24th, you notified your retailers to take off three percent of the ten percent, didn't you?

A. Yes, 30 per cent of the 10 percent. Yes, I notified them there, yes.

Q. That was not until— [68]

A. That was—an arrangement was made to comply with the objections to the beef and veal here, I think.

Q. Well, you received this on August the 30th or thereabouts, and it was a whole month before

(Testimony of O. B. Joseph.)

you did anything. Can you tell the Court why you waited a month to do anything on that?

A. Yes, I was ill, and the doctor ordered me away for a time, and I did not seem to get any better and I came back and I was in bed for two or three weeks.

Q. Well, somebody tends to your business when you go away?

A. Well not on matters of this kind, they hadn't, because I had been handling it.

Q. Had Mr. Smith been handling it for you?

A. Yes, sir, Mr. Smith had been handling it for me.

Q. What did he do, anything, do you know?

A. Well, I don't know.

Q. There was nothing accomplished as far as these contracts were concerned, until September the 24th, is that right?

A. I think not.

Q. Now, do you remember receiving that letter from the Office of Price Administration? That copy was sent to your attorney, Mr. Smith. I don't know whether you have the original or not.

A. Yes, I remember this letter.

Q. Do you remember that letter. You received it, did you, from the——

A. Yes, sir.

Q. Office of Price Administration?

A. Yes, sir. [69]

Mr. Hughes: You are familiar with it. Do you have any objection?

Mr. Agnew: No objection.

The Court: It will be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon copy of letter dated 7/30/43 to Henry Packing Co. from OPA, was then received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. Now, referring to that—

Mr. Hughes: Pardon me, what was the number of that?

The Clerk: Plaintiff's 1.

Q. Referring to that exhibit, Plaintiff's 1, dated July the 30th, 1943.

Mr. Hughes: Which, Your Honor, I would like to read into the record:

“James Henry Packing Co.

“2023 Airport Way,

“Seattle, Washington.

“Attention: Mr. Joseph, President.

“Dear Mr. Joseph:

“You will recall that early in July you and Mr. Smith called at our office and conferred with Judge Hartson and me with respect to the validity, under Revised Maximum Price Regulation 169, of certain proposed transactions whereby you would lease a number of retail meat markets in the city of Seattle. At that time we advised you that the leasing arrangement first prepared by Mr. Smith would be illegal under Revised Maximum Price Regulation 169. Mr. Smith then prepared sample documents, consisting of a lease and a contract [70] of employment, which were submitted to this office for con-

(Testimony of O. B. Joseph.)

sideration. We referred copies of these documents to our San Francisco office for their opinion.

“Yesterday we received a teletype from our National Office on this general subject which makes considerably more clear the position of OPA. Our National Office advises us that because of the patent danger of evasion of the wholesale maximum prices established by Revised Maximum Price Regulation 169, any arrangement which falls short of a complete transfer of ownership and operation of a retail outlet to the wholesaler must be deemed to be forbidden as an evasion if, as a consequence of the arrangement, the wholesaler receives a greater return for the meat supplied than the maximum prices described in Revised Maximum Price Regulation 169.

“We are also advised that a clarifying amendment will soon be issued which will specifically incorporate this rule into Section 1364.406 of the Regulation.

“In view of this expression of policy on the part of our National Office, this Office now is of the opinion that the proposed leasing arrangements between James Henry Packing Co. and various retail meat markets in the city of Seattle are forbidden evasions of Revised Maximum Price Regu-

(Testimony of O. B. Joseph.)

lation 169. We shall, of course, be glad to discuss this matter with you further at your convenience.

“Very truly yours,

“CLINTON H. HARTSON,

“Chief Attorney,

“By: JOHN B. SHOLLEY,

“District Price Attorney.”

Q. You received that letter in due course, I presume? A. Yes, sir.

Q. And what did you do when you received this letter of July the 30th, concerning these leases and contracts?

A. I just referred it to our counsel.

Q. Did you do anything about it at all?

A. I referred it to Mr. Smith, our attorney.

Q. Did Mr. Smith advise you what to do?

A. I don't know just what time it was, but around that time I think was when I was away, or shortly after that, that I was taken ill and left.

Q. Well, you referred this to Mr. Smith at the time? A. Yes.

Q. And you did not do anything about this letter until two months later, September the 24th, when you notified these meat dealers to take off three percent of the ten percent, is that correct?

A. Well, not quite, no. There was—I think Mr. Smith had several conferences with them and I think there was some other—

(Testimony of O. B. Joseph.)

Q. I am talking about what you know of your own knowledge, I am asking you now.

A. No, I don't know, just without—

Q. Well, the only move you made pursuant to this letter was September the 24th, as far as you know?

A. Passed it on to our attorney, yes.

Q. Who had authority to manage the James Henry Packing Company while you were away?

A. Well, Mr. Murray our superintendent looks after the operation of the plant. [72]

Q. What is he—what is his title?

A. Superintendent of the plant.

Q. Superintendent of the plant, and who is vice-president? A. Mr. Curtman.

Q. Mr. Curtman. Either of those or both of those were familiar with these transactions, weren't they?

A. Well, I wouldn't say they were familiar with them, no.

Q. They are on the board of directors, aren't they? A. Yes, sir.

Q. You say they authorized you to sign these leases? A. Oh, yes, that is all right.

Q. And they knew about it?

A. Oh, yes, they knew about them.

Q. Well, why didn't you cancel these leases as soon as you received this letter on July the 30th that stated that it was an evasion—or do you know why?

A. Well, we figured that regulation regarding

(Testimony of O. B. Joseph.)

the beef and veal, it seemed to be the only difference that there were.

Q. Well, you did not do anything with that until two months later. Why did you wait?

A. And then we made arrangements to reduce the price on it.

Q. The beef and veal? A. Yes, sir.

Q. Well, you did not do that until two months later. Why did you wait two months?

A. I don't know just what time it was.

Q. You kept collecting all the time the full ten percent up until September the 24th, didn't you?

A. I don't remember the dates, but probably that is it, yes. [73]

Q. You didn't do that just to use up time, did you? You did not do that just to gain time, did you?

A. No, we did not do that just to gain time, no, sir.

Q. Did you refund any of these payments made during August and September, to any of these retailers? A. No, sir.

Q. You had not refunded any of the money at all that you received? A. No, sir.

Q. Of the nineteen thousand some hundred dollars? A. No, sir, we have not.

Q. Well, when you decided on September the 24th that it was illegal for you to do that as to the beef, did it occur to you that you should repay them what they had paid you for the beef?

A. Did it? No.

(Testimony of O. B. Joseph.)

Q. It did not occur to you? A. No.

Q. Well, why did you finally cancel this lease and contract November the First?

A. Well, from the position that the O.P.A. has taken, we found that there would be no use to argue with them any further. We did feel, however, that we were perfectly on the right, and I still do feel so, and even in this letter here it does not definitely say that that is the definite opinion. It said there will be a clarifying amendment soon to be issued and that they will be glad to discuss the matter further at their convenience, so this here was just a matter of the opinion of the man who seemed to write it, I take it. [74]

Q. Now, as a matter of fact you did not. The reason you waited was because you knew the O.P.A. was investigating you pretty closely about that time, around the latter part of October or 1st of November, didn't you?

A. I did not know that they were until about that time, no.

Q. About that time? A. No.

Q. And as counsel has already mentioned, you were indicted in November, 1943?

A. That is right.

Q. Yes, and the indictment was dismissed?

A. It was dismissed, yes.

Q. And this suit was brought. This suit was brought before the indictment was dismissed. Now it was not until the indictment was returned in November, 1943, was it?

(Testimony of O. B. Joseph.)

A. I don't recall the dates.

Mr. Hughes: I think that is all.

Redirect Examination

By Mr. Agnew:

Q. Showing you Exhibit—I believe dated November 2, Exhibit A-8, a letter to all your market men, I will ask you to refresh your memory by examining that and then state as of what date the contracts were terminated.

A. They were terminated as of November 1st.

Q. At that time did you know about any indictment? A. No, I did not.

Q. These had been terminated before any indictment? A. Yes, sir.

Q. It was mentioned about whether these places had any [75] licenses or not—whether you got any for them or not. I will ask you whether or not they had licenses?

A. Well, all these markets had licenses.

Q. Did you take up the question of getting them in your own name?

A. Well, I remember we did discuss it, but we just figured we would let them run out—until they expired, and then renew them.

Q. Was the question of social security tax or unemployment tax raised or taken up at all?

A. Well, I recall that Mr. Smith did speak to me about the social security tax, but we just didn't get around to do anything about it.

Mr. Agnew: That is all.

(Testimony of O. B. Joseph.)

Mr. Hughes: Just a moment, Mr. Joseph.

The Court: The Court wants to ask you a few questions.

These 25 stores or meat markets here involved, were they all customers of yours prior to July, 1940?

A. Yes, sir, they were.

The Court: And did you have others in addition to these twenty-five that bought your products?

A. Yes, sir.

The Court: What did you do with the other stores?

A. Well, we gave them a little, as we had been doing before.

The Court: But you gave these more?

A. Yes, sir.

The Court: Of certain grades of meat? [76]

A. Yes, of everything, that is right.

The Court: Did you change your program at all, of billing them for their meat, over what it had been before you entered into this contract-lease arrangement?

A. No, there would be no change in the billing. We bill them just the same as we do our own market down on Western Avenue.

The Court: Now if your business in July had not have found itself in difficulties with these O.P.A. regulations, particularly the one covering—I think you said beef products? A. Yes.

The Court: Would this arrangement have been made any way? Let me ask the question in another manner. Suppose we had not been in the war and

(Testimony of O. B. Joseph.)

had not had the emergency, was there anything in the situation that would have caused you to have gone out and enter into these so-called lease agreements?

A. Well, it was on account of the shortage of meat that precipitated these leases.

The Court: Well, before you experienced these difficulties and what you considered the inequities of the O.P.A. regulations to the packing industry, were you or your board planning on buying any of these markets?

A. No, no, we were not, no, sir.

The Court: And it was for the purpose of bringing, as you contend, yourself within the provisions of the O.P.A. regulations, and yet being able to be able to continue on your slaughtering of beef, that you took these? [77]

A. Yes, it was.

The Court: Now you said you selected them in appropriate places throughout the city?

A. Yes, sir.

The Court: And what was your object in doing that?

A. Well, so many housewives would be able to get one kind of meat at one place, and they would have to go to another, and to another, and sometimes they were running around spending a whole afternoon trying to find certain kinds of meat. Well, when we took these markets over, we put a full supply of meat in there, and had them so that they would be a long ways from each other and also

(Testimony of O. B. Joseph.)

around so that the public in all parts of the city would have an opportunity to make purchases.

The Court: How many of these 25 markets had businesses other than that of selling meat?

A. Well, most of them. I don't recall just how many there are there, but——

The Court: Twenty-five listed.

A. I know, but most of them had other businesses besides selling meat.

The Court: Well, did the owners or operators of them prior to July when this contract came into being, continue to carry on thereafter just as they had before they had signed this agreement, with their business as a whole?

A. Oh, yes, they kept on just the same as they did.

The Court: And when you were receiving under [78] this arrangement the 10 percent, and later the 7 or 6 percent, was that on gross meat sales?

A. Yes.

The Court: Did that include all meats that the market sold?

A. It included all meats that the market sold, and anything else that the market handled. If they handled fish it would include that.

The Court: Butter and dairy products?

A. Well, if they handled it, yes.

The Court: But it did not include groceries if they handled groceries? A. No.

The Court: Or confections?

A. No, nothing like that.

(Testimony of O. B. Joseph.)

The Court: Well, could you advise the Court as to how many, you think, of these 25 did handle groceries and confections and things other than meat products and dairy products?

A. Well, let me see——

The Court: Val Sontag is the first one.

A. No, he did not.

The Court: Nothing but meat?

A. He had nothing but meat.

The Court: Mary Klontz?

A. Mary Klontz? She has groceries, too.

The Court: You don't know what relationship their gross receipts were as between groceries and meat?

A. Well her groceries would be much more than meat. I think she has quite a large place. [79]

The Court: Paul Snyder?

A. Paul Snyder, he has a very large grocery store, too.

The Court: And his gross sales would, in the grocery supply, probably would exceed the meat sales? A. Oh, much more, I am sure it would.

The Court: He had other employees besides himself, there?

A. Oh, yes, he had a number of employees.

The Court: Ray Parmenter?

A. Ray Parmenter, he handled just meat.

The Court: Just meat? A. Yes, sir.

The Court: And Becker Brothers?

A. They had both.

(Testimony of O. B. Joseph.)

The Court: Lindquist & Brown?

A. Just meat.

The Court: Blunden?

A. Blunden, he had just meat.

The Court: Mulholland?

A. He had both groceries and meat.

The Court: Carstensen?

A. Both groceries and meat.

The Court: And Anderson?

A. Both groceries and meat.

The Court: And Stockley?

A. Stockley, both groceries and meat.

The Court: Paar?

A. Paar? Both groceries and meat.

The Court: Mangan? [80]

A. Mangan, both groceries and meat, yes, sir.

The Court: Bosanko?

A. Bosanko was just the meat.

The Court: And Thompson?

A. Just the meat.

The Court: Etten?

A. Etten? No, he would have both.

The Court: Wilmot?

A. Wilmot? Just the meat.

The Court: And Marti? A. Both.

The Court: And the Bungalow Grocery & Market?
A. The Bungalow, they have both.

The Court: And William Myers.

A. He has both.

The Court: And Warren Meyer?

A. Warren Meyer? He has both.

(Testimony of O. B. Joseph.)

The Court: And Mar?

A. Mar has both groceries and meat.

The Court: And Vodarski & Sparling?

A. No, they have both.

The Court: And Mirante?

A. Mirante? Just the meat.

The Court: Just meat? A. Yes.

The Court: And Hartwig?

A. Hartwig, just the meat.

The Court: Well, if I have counted them correctly and checked correctly, sixteen of the twenty-five handled groceries and meat. [81]

A. Yes.

The Court: Now in fixing the rental on these premises, did you try to make any distinction at all as to whether—make an allowance or a charge for the grocery business? I ask that not to mislead you in any way, but because your rental range was from twenty to thirty-five dollars.

A. It depended on the size of the market and what would be a reasonable rental for it.

The Court: Did you intend to assume all of the various legal liabilities that you would by reason of becoming the lessor—or the lessee, I mean, or the actual operator and owner of these that you do under the State and Federal laws, under wages and hours and overtime? A. Yes, sir.

The Court: Did you do that?

A. Yes, we did.

The Court: You watched to see that they did not work over the 40 hour week?

(Testimony of O. B. Joseph.)

A. Of course I did not—I could not see each one of them, you know.

The Court: Well, any of them?

A. But we assumed that responsibility.

The Court: But did you check up with any of them to see whether they were complying with it?

A. No, I did not ask them personally.

The Court: Was it your intention to become liable for Federal Social Security tax and Old Age Retirement on these people? [82]

A. Yes, sir.

The Court: Did you?

A. We are liable for that.

Mr. Hughes: What is that?

A. I say we are liable for them.

The Court: Did you make returns to the federal agencies? A. No, we have not.

The Court: And then of course you were asked the question on the State tax, and of course you would be liable for the local tax, would you not, state and county and city on property?

A. Well of course that is all collected and reported in with the business, you know, as the expenses of the business, those things, you know.

The Court: Do you know whether you made any effort to comply with the state sales law, when you take over a business to ascertain who the creditors are and liabilities to them?

A. No, I did not, because these were all substantial people that we were doing business with.

(Testimony of O. B. Joseph.)

The Court: Now you had one market that you actually owned outright and there was no question about it, and it is not involved in these twenty-five?

A. No.

The Court: And it made an outlet for so much of your product as the customers' requirements called for? A. Yes.

The Court: Well, is it your contention that [83] you intended to make of all these businesses a business similar to the one that you had?

A. It was, yes. We expected that we could renew these leases at the end of the year and—

The Court: But you had in each one of these so many other situations involved,—the grocery business and the—

A. No, we did not have anything to do with the grocery business.

The Court: I know, but the man renting the grocery store was running a butcher shop and so he was a butcher, but a grocer on one side of the store, and an employee of yours. A. Yes, sir.

The Court: Did you check how much time he put in for you and how much time he put in for himself?

A. No, because that would be his own lookout for that.

The Court: I think that is all.

A. He paid all the expenses of the operation.

Mr. Hughes: Mr. Joseph, I want to ask you another question.

(Testimony of O. B. Joseph.)

Recross Examination

By Mr. Hughes:

Q. Weren't these 25 retail dealers approached by your salesmen concerning this contract and the lease that has been referred to?

A. Well, not that I know of.

Q. Didn't you talk to your salesmen to mention it to any [84] of them?

A. You don't have to talk to them.

Q. Well, I thought maybe you had mentioned it to them, because they visit them quite often, don't they, your salesmen?

A. Yes, sir.

Q. As a matter of fact, that is how any of these came to you and talked to you, because your salesmen asked you to talk to them about this contract, is that not true?

A. No. I don't think it is, because some time before we entered into any of these leases, a number of market men came in to see me to see if we couldn't make some arrangements, and——

Q. Well now, if these meat market men, some of the twenty-five are here now, if they were to say that they were approached by your salesmen and told to come to see you, would you say that that was a fact or not?

A. Well, I couldn't say, but they may have told some of them that, that we had made some other leases.

Mr. Hughes: I think that is all.

(Witness excused)

Mr. Smith: If Your Honor please, I would like to take the stand and identify some letters, but I may be able to contribute something to the argument and would not like to do so unless agreeable to counsel.

The Court: Very well.

Mr. Hughes: That is all right. [85]

ALMON RAY SMITH,

called as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Agnew:

Q. Will you state your full name, please?

A. Almon Ray Smith.

Q. You are a professional lawyer?

A. Yes, sir.

Q. How long have you been practicing law?

A. Since about 1912.

Q. And have an office here in Seattle?

A. Yes.

Q. Are you attorney for the James Henry Paeking Company?

A. Yes, sir, I have been since about 1935, I guess.

Q. When was the first question brought to you relative to the leases and employment agreements concerned in this matter?

(Testimony of Almon Ray Smith.)

A. Either the latter part of June, 1943 or the early part of July, and I think it was the latter part of June Mr. Joseph called me and consulted me about it on the telephone. Then he came to the office and we had a conference there, and he wanted a form of lease and a form of contract prepared, which I did.

Q. Did you thereafter take the matter up, of that form of contract, with any official of the Price Administration?

A. About July 1st, Mr. Joseph was asked to call at the local office of the O.P.A. regarding this lease and [86] contract. He telephoned me and I met him there, and we had a conference with Judge Hartson with Mr. Scholley, with Mr. Eddington and with some other attorney in the department whose name I have forgot.

At that conference Judge Hartson had copies of my first draft of a lease and the contract of employment, each of which were made subject to cancellation upon 30 days notice.

Q. Was objection made to that form?

A. Judge Hartson objected to that feature.

Q. Did you redraft the contract?

A. I redrafted the contract—the lease and the contract, omitting that feature, making it absolute for the term of one year, and not subject to the cancellation.

Q. Did you again take that matter up with Judge Hartson?

A. Yes, sir, I took the new lease——

(Testimony of Almon Ray Smith.)

Mr. Hughes: Just a moment, if the Court please, I think at this time I should object to any testimony which may state what Judge Hartson told Mr. Smith. On the first ground, I believe it is hearsay, and upon the second ground that procedural regulation No. 1, if I may read it to the Court, Section 54, Interpretations.

“An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with Section [87] 55 of this regulation,” and so forth.

Now I will read Section 55 of this regulation:

“Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder shall request it in writing from the nearest district office of the Office of Price Administration. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and post office addresses of the persons involved.”

And there are other parts of this which I will not read now, but I will pass it up to the Court.

“Any official interpretation, whether or general application or otherwise, may be revoked or modi-

(Testimony of Almon Ray Smith.)

fied by publicly announced statement by any official authorized to announce such interpretations of general application or by a statement or notice by the Price Administrator or General Counsel published in the Federal Register. An official interpretation addressed to a particular person may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the General Counsel or any Associate or Assistant General Counsel. An official interpretation addressed to a particular person by a Regional Attorney, a Regional Price Attorney, or a District Price Attorney may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the [88] Regional Attorney or by the attorney who issued it or his successor."

Now it is quite apparent from that that the requests must be in writing and must set out all the facts and the answer or the interpretation must be in writing and should be signed by one of the following officers.

Now, Your Honor, the purpose of that is very apparent now, because if it were otherwise, some one without authority may be binding the government or its agency to something that they hadn't any right to do.

If counsel wants to show estoppel he should plead estoppel. At any rate, this is a matter of evidence that I think goes to the competency—

The Court: Well, it is your contention that the interpretation placed upon the regulations or the

(Testimony of Almon Ray Smith.)

act, if made by the Administrator or laid down by the man lowest in the scale enumerated, would become binding upon the Court, and the Court could not question the interpretation?

Mr. Hughes: That is right, if it is in writing. If he is going to state some things that Judge Hartson said to him, I think he ought to call Judge Hartson here.

The Court: I am inclined to doubt your position that the interpretation of either of the law or the regulations must be accepted by the courts unquestioned—the regulations must be so accepted, because we can not question their constitutionality and the act itself must be so accepted, but if some one in the administrative branch of the government renders [89] an opinion, that opinion surely can not become the law and binding upon the courts. Otherwise, it seems——

Mr. Hughes: I think you are right on that.

Mr. Layman: If the Court please, I believe if I may add a word, under the procedural regulation such an interpretation would be binding upon the O.P.A. and I think that is probably where the line should be drawn.

The Court: I think I will let the witness answer, because there is an element of good faith in here and I am going to ask counsel, probably, to advise me a little further, and I will inform myself a little further in reference to the penalty provisions, and as to assuming that without now deciding that the government's position is sound here,

(Testimony of Almon Ray Smith.)

but without regard to good faith at all, must the Court impose triple penalties?

Mr. Agnew: That is the portion of the statute I was about to read. That is what makes this evidence clearly admissible.

The Court: Isn't there a case—a like case in Washington, D. C. that involves this, decided by the District Court?

Mr. Agnew: We have the new amendment to the statute, directly to the point, that went into effect July 1st of this year.

Mr. Layman: The like decision is an injunction matter.

The Court: But it discusses a great many features of this Price Control Act.

Mr. Agnew: Of course, under the new amendment [90] it provides for triple damages with this proviso:

“Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.”

so I think clearly this evidence would be admissible.

The Court: I think I will allow it.

Mr. Agnew: I have another argument for its admissibility I could argue later.

I think the question was:

(Testimony of Almon Ray Smith.)

Q. Did you take these leases to Judge Hartson, —the new leases?

A. I redrew the form of lease and contract and went back to Judge Hartson's office.

The Court: I wish you would fix the time, there.

A. This was about July 1st, Your Honor. I can not give you the date. It was the early part of July.

Mr. Hughes: That is the first time you went there?

A. That was at our first conference, and I made the trip back to Judge Hartson's office after having prepared a new lease and contract.

Q. Was it the same day?

A. The same day, late that afternoon, and Judge Hartson, I [91] believe, was alone in his office at that time.

Q. What did he say with reference to the new lease and agreement as you then had it drawn?

A. He read the documents and he said "That is a good lease." He made no comment on the contract. He took them both together and said "That is a good lease."

Q. Were you present at the execution of any of them? A. Yes.

Q. Was it done in your office?

A. Some of them, I think.

Q. Were you present at the execution of all of them, do you know?

A. I believe I acted as Notary on the majority of them, at least.

(Testimony of Almon Ray Smith.)

Q. And when did you next hear from the Office of Price Administration, either you, or any letter referred to you, about the matter?

A. I believe the next step in the transaction was the letter from Mr. Sholley of July 30th, a copy of which was sent to me, at that time.

Q. I will ask you if that is the exhibit, if you will read the number of the exhibit?

A. It is Plaintiff's Exhibit 1, yes.

Q. Is that what you are referring to?

A. That is the letter I refer to, and this is the copy that was sent to me by the Office of O.P.A. Mr. Joseph was in Canada at that time. I don't believe he saw the letter—the original of the letter for some weeks afterwards.

Q. Now, I will ask you if you answered that letter? [92] A. I did.

Q. Calling your attention to Defendant's Exhibit A-9, dated July 31, I will ask you if that is the answer to the letter? A. It is.

Mr. Agnew: Well, this letter of July 30, the last sentence in it says:

“We shall, of course, be glad to discuss this matter with you further at your convenience.”

I offer A-9, the answer.

The Court: It will be admitted in evidence.

(Whereupon, letter to Mr. Hartson dated July 31, 1943, from Mr. Smith, was received in evidence, marked Defendant's Exhibit A-9, and read to the Court.)

(Testimony of Almon Ray Smith.)

DEFENDANT'S EXHIBIT A-9

July 31, 1943

Mr. Clinton H. Hartson
Office of Price Administration
3312 White Henry Stuart Building
Seattle 1

Dear Mr. Hartson:

I received a carbon copy of Mr. Sholley's letter to James Henry Packing Co. advising us of the decision of the National Office to treat the acquisition of retail markets by a packing company under leases as an evasion of price ceiling regulations.

Mr. Joseph is on vacation in Canada, and as soon as he returns, we will get in touch with your office for the suggested conference.

Very truly yours,

.....

ars c

Q. That was the conference suggested by this letter? A. Yes.

Q. Now this letter mentioned that he believes that in a short time there will be a regulation passed clarifying the matter. Was that regulation finally passed?

A. Amendment 26, effective August 16, I believe, came out in press reports as far as I knew, about August 23rd, and Mr. Joseph had come home from Canada ill. I did not get to see him and there was no one else in the company I could consult, but

(Testimony of Almon Ray Smith.)

upon reading Amendment 26 I wrote a letter to Judge Hartson, expressing it was my opinion it was not applicable to our case because the markets were wholly owned and operated, and asking for an interpretation of it. That was August 23rd.

Q. Calling your attention to A-10, I will ask you whether or not that is a copy—true copy of the letter you sent [93] asking for that interpretation?

A. It is.

Mr. Hughes: I do not seem to have a copy, but if you say it is the same, that is all right.

A. It is.

Mr. Agnew: We offer A-10.

The Court: It will be admitted in evidence.

(Whereupon letter dated August 23, 1943, from Mr. Smith to Mr. Hartson, was received in evidence and marked Defendant's Exhibit A.-10.)

DEFENDANT'S EXHIBIT A-10

August 23, 1943

Mr. Clinton H. Hartson
Office of Price Administration
3312 White Henry Stuart Building
Seattle

Dear Judge Hartson:

Through a press service, I have just received a copy of the amendment to MPR 169 reading as follows:

“Any transaction, device or arrangement

(Testimony of Almon Ray Smith.)

whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such persons receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited."

It seems to me that the retail markets which have been leased to James Henry Packing Co. are, within the purview of the amendment, "wholly owned and operated" by the packing company. The packing company is not receiving "for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer," but is operating the meat market in its entirety, and, beef and veal constitute only a part of the merchandise sold.

The lease is absolute, and for its duration the packing company has all of the responsibilities and risks of ownership, and, of necessity, the benefits, if any, resulting from such ownership.

In negotiating these leases, the packing company has provided a means whereby wholesome, inspected meats can be legitimately distributed to the public, and, at the same time, enables these retail markets and the packing company to survive wrong and oppressive conditions resulting from the failure of the Office of Price Administration to include livestock in its price ceilings.

(Testimony of Almon Ray Smith.)

I most earnestly submit that the lease transaction is not an evasion, and it is incredible that the Office of Price Administration should obstruct the efforts of citizens to lawfully meet and correct an unnecessary, onerous condition for which the Office of Price Administration is largely responsible.

The Henry Company has concluded approximately twenty-five leases, all of which are for a term of one year and not subject to cancellation. If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation. All of these markets had well established businesses, but many will no doubt suspend if the leases must be cancelled.

In requesting an interpretation of the amendment, may I again point out that the leases are in no sense devices, but absolute and legal lease transactions.

Very truly yours,

.....

ars c



Q. Now I will call your attention to the letter from Mr. Stoneman the Enforcement Attorney, dated August the 30th, in which he ends by saying:

“A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions.”

(Testimony of Almon Ray Smith.)

Did you immediately after receipt of the letter take any steps to rescind or did you try to make some other arrangements?

A. Upon receipt of Mr. Stoneman's letter on August 1st, I had a conference with Mr. Joseph and we concluded that inasmuch as the objection was based on 169, relating entirely to beef, that we could eliminate beef—eliminate any benefit from beef, and there would be no further objection from the O.P.A., and we proceeded to do so, and shortly after that I wrote a letter to Mr. Stoneman sending him a copy of our letter to all managers requesting them to deduct all beef sales before computing the [94] percentage of the packing company. It developed that none of the retail markets kept segregated accounts of beef. Mr. Joseph had conferences with each and every one, and with the exception of two, they agreed that 30 percent would be a proper percentage. One thought 40 and one 50. Thereafter, that percentage was eliminated from the gross before computing the packing company's percentage.

Q. Did you take the matter up with the O.P.A. office as to whether or not such reduction would satisfy the requirement? A. We did.

Q. And when did you get a definite answer that it would not?

A. Well, it was the date of Mr. Stoneman's last letter there. I have forgotten the date. Not until then did we have definite knowledge that they considered them to be——

(Testimony of Almon Ray Smith.)

Q. Calling your attention to a letter that was sent out to all of the dealers on November 2, asking cancellation of all the contracts as of November 1, I will ask you if on November 2nd you had any conference with the officials of the O.P.A.?

A. Yes, I did.

Q. And as a result of that conference I will ask you whether or not that was the time you got the definite answer that deduction on beef sales would not satisfy them? A. That is true.

Q. I will ask you if at all times, whether or not you [95] advised the James Henry Packing Company that these leases and agreements were legal and not violative of the O.P.A.?

A. Yes, sir, I did.

Q. That was your opinion then?

A. That was my opinion.

Q. And now? A. And is now.

Mr. Agnew: You may cross examine.

Cross Examination

By Mr. Hughes:

Q. You say Mr. Joseph came to your office around somewheres—before July the first, and asked you—and told you he wanted a lease and contract drawn for these meat markets?

A. Yes.

Q. And that you drew this lease and contract and on or about July the First you took the first draft up to Mr. Sholley and Mr. Hartson?

A. Yes.

(Testimony of Almon Ray Smith.)

Q. Did you take it up to those two?

A. Yes, sir.

Q. And he told you it was unsatisfactory?

A. Yes.

Q. And that same day you say you redrafted the lease. The contract remained the same, did it?

A. Except that the original contract was also subject to cancellation upon 30 days' notice by either party. That feature Judge Hartson objected to and I deleted it. [96]

Q. Those were the only two features he objected to, you say? A. I think so.

Q. Well, do you know? Can you state positively?

A. Well I will state positively, because he made no objection to the redraft, and those were the only changes.

Q. You brought that redraft back and you say Judge Hartson told you that the lease was all right?

A. Yes.

Q. What did he say? What were his words?

A. His exact words, which you will find in one of these exhibits was "Ray," he said, "that is a good lease".

Q. What did he say about the contract?

A. I don't recall that he said anything about the contract. He just had the two together.

Q. He said that was a good lease?

A. Yes.

Q. He said "That is a good lease" as a matter of fact—

A. Yes.

(Testimony of Almon Ray Smith.)

Q. "But it is not a good lease under these circumstances." A. It is a splendid——

Q. Did he say "under these circumstances"?

A. No.

Q. All he said was "a good lease"?

A. Yes.

Q. Now you say on July the 31st, I believe, you wrote the O.P.A. and told them that in answer to theirs of the same date, I guess, that Mr. Joseph was on vacation. What did you do to rectify the situation at that time?

A. I did nothing, as I have just testified, by reason of [97] having no opportunity to confer with Mr. Joseph who was home ill, after returning from Canada, until Amendment 26 was issued, and then I wrote Judge Hartson again, expressing my opinion that it was not applicable to our lease and asking for his opinion, or an interpretation.

Q. You are secretary of the James Henry Packing Company, aren't you?

A. I am but not an executive. I am not actively associated.

Q. Well, the superintendent attends to business while he is gone? A. Nothing of this kind.

Q. And you let this matter ride for a period of two months before anything was done?

A. Mr. Hughes, there was nobody at the James Henry Packing Company except Mr. O. B. Joseph, with whom I could confer about this matter. In fact, no one there knew very much about it, if anything.

(Testimony of Almon Ray Smith.)

Q. After you were notified on July 31st definitely that the lease was objectionable—

A. I was never—

Q. You still continued to collect money until September 24th?

A. We did not,—we took no steps then to cancel the lease because I still believed that the leases were not evasions, and we had no definite interpretation from the O.P.A. That was a matter of just a couple of weeks, and up to that time there had been no amendment—there had been no regulation.

Q. Now in your letter of August 23rd, referring to [98] Defendant's Exhibit A-10, you say:

“It seems to me that the retail markets which have been leased to James Henry Packing Company are, within the purview of the amendment, wholly owned and operated.”

Now you don't claim that they were either wholly owned or wholly operated, do you?

A. I don't claim so. I am sure they were.

Q. They were, notwithstanding the fact that he, as you heard the testimony this morning, testified that none of these leases were filed—

A. That was their responsibility, but I do not file one year leases, do you?

Q. Do you know there is no—Mr. Smith, that there was no social security arrangements made to take care of the social security requirements?

A. Matters were going pretty fast and there was a number of things to do in connection with negotiating leases of twenty-five business establish-

(Testimony of Almon Ray Smith.)

ments. It escaped my attention. That was my oversight, but along in August, I either by telephone or orally, informed Mr. Joseph that we should make social security returns, because even though they were working on a percentage basis, they were employees and at that time we had further conferences about illegality and there was nothing certain about our continuing, and I did not follow it up.

Q. As a matter of fact you made no provision for the social security during the whole time these contracts ran? [99]

A. No, we made no reports.

Q. You made no application to the State?

A. No, that is right.

Q. For permission to do business, did you?

A. No.

Q. And you paid no retail sales tax as an owner of the business?

A. Well, the markets pay that, of course.

Q. But you know the owner has to make application and be responsible for that, don't you, to the State?

A. The State is only interested in getting the money, and it was being paid by the market. Their manager represented James Henry Packing Company in all those matters.

Q. You know you have to make application to the State to do business.

A. Yes, you should get——

(Testimony of Almon Ray Smith.)

Q. And you know Mr. Joseph or the defendant has never made such application?

A. That is true. This only lasted about——

Q. You also know we have a similar ordinance requiring the same thing to be done in the City of Seattle, is that correct?

A. The markets had licenses, you know.

Q. I am talking about the occupational tax—the business tax, now.

A. I am not sure that was in effect then. I don't think it was,—I don't think it was.

Q. Well, it was in effect in July, 1943, the city?

A. The city occupational tax? [100]

Q. The city occupational tax went into effect July 1, 1943?

A. If it was and it was necessary for us to get that dollar certificate, that was another oversight of mine.

Q. When you made these leases you made no inquiry from the owner, whether the tenant had any right to lease to the defendant, did you? Did you make any inquiry about that? A. No.

Q. Well, wouldn't you do that, ordinarily, when you are going into a lease?

A. It didn't occur to me that any owner of premises would object to having a more responsible tenant, on a one year's lease.

Q. Yes, but Mr. Smith, you did not know that the same provisions applying to your lease applied to the lease between the retailer and the owner, did you?

(Testimony of Almon Ray Smith.)

A. If the owner had any objections we would have heard from him and we would have had to deal with him.

Q. You never notified the public you took these stores over? A. How do you notify?

Q. By press, and otherwise, and signs.

A. We were about to.

Q. Well you did not notify the public?

A. It never occurred to me there was any obligation to notify the public.

Q. Well, nobody knew they were dealing with the defendant in this case when they went there to buy meat, did they?

A. Well, I don't suppose Mr. Joseph made a point to be there and tell them. Perhaps the managers did, and as I [101] say, we were getting signs made to put up there.

Q. On the face of these oversights you still claim it was wholly operated?

A. With that solemnly executed and acknowledged lease I can't see how the James Henry Packing Company could be anything but the sole and exclusive owner of that business. Now if not, what was their relation and what was the relation of the manager.

Q. I am asking you this question, too: There was no rent ever paid by the defendant to any of these retail markets in accordance with the lease?

A. Well, that has been gone over many times, Mr. Hughes, but there was no transfers of checks.

(Testimony of Almon Ray Smith.)

Q. No transfers of money or anything else of value, was there?

A. No, it would have been an idle ceremony to do it under the language of the contract.

Mr. Hughes: We disagree on that. I just wanted the record to show it.

Q. You say in the latter part of your letter:

“If the Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation.”

but nothing was done, notwithstanding this?

A. I think it was very manifest from that date we at that time were deferring to the opinion of the O.P.A. and if it developed that the thing was going to continue to be objectionable to O.P.A. we would ask for a mutual rescission. We entered into 25 leases, and it is something [102] that couldn't be dismissed lightly. These people were all satisfied with their leases, were doing better, and did not want to cancel.

Q. Now, Mr. Smith, you stated, I think—if I am wrong tell me—you stated on November 2nd there was a conference you had with the O.P.A. which was the first time you knew that these deductions were unsatisfactory.

A. I did not say unsatisfactory. I believe there had been a letter from Mr. Stoneman before that, had there not?

Q. Yes. A. Which I answered.

(Testimony of Almon Ray Smith.)

Q. Yes, you knew some time before that that the O.P.A. did not approve. You knew as early as July 30th?

A. I was never sure what they did approve or did not approve. We couldn't find out. We were both groping in the dark for light on the thing.

Q. Now who did you say said there would be no objection if the beef were eliminated?

A. I did not say anything about who said that. We assumed that nobody would longer object if it were eliminated.

Mr. Hughes: I think that is all.

Mr. Agnew: That is all.

The Court: It is now time for adjournment. How many more witnesses do you have, Mr. Smith and Mr. Agnew?

Mr. Agnew: That is our case.

The Court: How long will it take you to present your case?

Mr. Hughes: Well I thought I would put Mr.— I would like to put Judge Hartson on for about two [103] minutes, and I think probably we can close it.

(Witness excused.)

The Court: Very well. The Court has got to drive back to Tacoma.

Mr. Hughes: I do not want to keep Your Honor.

The Court: You may call Judge Hartson.

CLINTON H. HARTSON,

called as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hughes:

Q: Judge Hartson, were you Chief Attorney for the O.P.A. during 1943, in say June until November, 1943?

A. Till about September 17, 1943.

Q. From prior—sometime prior to that, I suppose you started?

A. About a year and a half.

Q. Judge Hartson, you heard—I don't know whether you heard Mr. Smith's testimony or not as to what—

A. A portion of it. He was on the stand when I came into the courtroom.

Q. Do you remember Mr. Smith, and Mr. Joseph, being in your office about—along about the first of July? Just to refresh your memory, here is a letter dated July the 30th. You might glance at it just to refresh [104] your memory about the dates.

A. Well, that is approximately true.

Q. And do you remember that Mr. Smith gave you a copy of his lease and contract of employment which he proposed to have executed, or had already executed?

A. Yes, I remember that. I remember that.

Q. And did you approve or disapprove of the first draft that was given you?

(Testimony of Clinton H. Hartson.)

A. We disapproved it.

Q. He said—Mr. Smith said he went back to his office and redrafted the lease and contract by changing the portion which provided for cancellation upon 30 days' notice, and he stated that after making that change you approved of the lease and contract. Would you state the facts?

Mr. Hughes: I have not had an opportunity to talk to Judge Hartson about this.

A. Yes, and I have not refreshed my recollection except by the paper you handed me just now. My recollection is different. About that time a number of the local packing companies were endeavoring to get some increases in income or profits by entering into leases with local butcher shops, and the Acme Packing Company was one, and there was a number of others. I remember very distinctly that the general problem was, as we saw it at our office in appraising those lessons or contracts, where did its economic burden lay,—or lie? Mr. Sholley was the Chief Price Attorney. Upon him, primarily, rested the technical answers to the question as to whether a particular lease was within the regulation. [105]

Q. That is Mr. Sholley, sitting here (indicating)?

A. That is Mr. John B. Sholley. At none of these conversations that I recall, was he absent. He may have been but if he was absent it happened because he didn't happen to be in the office door, and the conversations in most of these packing house

(Testimony of Clinton H. Hartson.)

matters—these lease matters were held in my office, because it was larger. Mr. Sholley's office at that time was quite small—couldn't accommodate many people.

The lease that was first presented by Mr. Smith, Mr. Joseph may or may not have been with him. I don't recall clearly. It was the most outstanding of clear violations—that is, in terms of not being adequate to be within our regulation, as we saw it. Mr. Smith was quite positive that it was all right, but he took it back and shortly—it may have been the next day or it may have been that day, he brought back something else, and my recollection—it is not too clear, was that it was not much better than the first one, but at that time we were going through in our office, a state of some uncertainty as to what the policy of the O.P.A. national office would be in those lease matters. The next office up, in the O.P.A. organization, was the Regional Office at San Francisco. In my conversations with Mr. Smith and Mr. Joseph and the other packing companies—and as I say Mr. Sholley was almost constantly present in those matters—we impressed upon them that the answer must come from the Regional Office, and about that time there was an abrupt decision by the National Office through the Regional Office that all of [106] these leases were to be abrogated—that is, no leases were to be approved by O.P.A. I may have said to Mr. Smith "That is a good lease", or something to that effect. If I did, he knew as well as I knew, that I was not

(Testimony of Clinton H. Hartson.)

speaking finally for the Office of Price Administration, and that we were in communication with the Regional Office and that the final answer would have to come through that office, or from that office. That is my best recollection.

Q. Did you give him to understand they would be notified when you heard from the Regional Office.

A. Well, I am not clear about that, but may I say I think he must have known it, because it was a very hot subject in the office at the time, and we told all these people about the same thing.

Q. You did communicate with the Regional Office about it?

A. Oh, yes, there must be correspondence I signed. No doubt I signed the letters as Chief Attorney, but they were prepared by Mr. Sholley. I don't believe I ever prepared a letter on this subject.

Mr. Hughes: That is all.

The Court: How long will it take you on your cross examination?

Mr. Agnew: Less than five minutes.

The Court: Very well.

Cross Examination

By Mr. Agnew:

Q. Judge, I believe you stated that at the particular time these leases were up for all these companies, there was [107] in your office some state of uncertainty as to what interpretation would be

(Testimony of Clinton H. Hartson.)

made in regard to the matter finally, by the National Office?

A. I think that is true. That is my recollection.

Q. And how long did you remain in the office, Judge, after that? Were you there in August?

A. Yes, until September 17th. I think I left on September 17th.

Mr. Hughes: '43?

A. '43.

Q. The record I think shows without dispute, Amendment No. 26 passed, evidently with the purpose of trying to clarify—it was passed effective August 13th, and we received word of it out here about five or six days later, I think August 23rd. Does that fit in with your recollection of the matter?

A. Well, that is a complete blank to me.

Q. The leases of the Acme Packing Company, for example were about the same number as this, were they not?

A. Number?

Q. In number, yes, that were proposed?

A. I don't recall that. There were quite a number in each case. The packing companies—I think this is responsive to your question—were aggressively taking leases or entering into leases with local butcher shops.

Q. Well, all of the leases of the Acme Packing Company were approved by your office, were they not?

A. Well, I recollect that they were in our opinion locally very much better—that is, more within the regulation.

(Testimony of Clinton H. Hartson.)

Q. More within the regulation in your opinion?

A. That is right.

Q. In any event, the Acme Packing Company were allowed to operate under these leases, were they not?

Mr. Hughes: Just a moment, I don't know what the purpose of this is, what the Acme Packing Company might have done.

The Court: I doubt its materiality.

Mr. Agnew: I would like——

The Court: To show that they were biased and prejudiced against this defendant, out of personal spite?

Mr. Agnew: No, I can't say that. My purpose is to try to develop that there was no real legal difference between the other packing companies' leases and this—no legal difference and no real sane reason why this would not be as acceptable as the others allowed to go and not prosecuted, and no suits brought against them, and they still operate.

The Court: Well, the Court will concern itself with the issues it has before it in the instant case. I think I shall have to sustain the objection.

Mr. Agnew: I think that is all, Judge.

Mr. Hughes: Thank you very much.

The Court: Do you have any more evidence, Mr. Hughes?

Mr. Hughes: I just want to put on Mr. Sholley later, about five minutes.

The Court: I am going to have to let the matter

(Testimony of Clinton H. Hartson.)
go over until tomorrow. We will adjourn court
until 10:30 tomorrow morning. [109]

(Whereupon, adjournment was then taken
until 10:30 o'clock a.m., December 13, 1944.)

December 13, 1944. 10:55 O'clock, A.M.

The Court met pursuant to adjournment; all
parties present.

Mr. Hughes: Your Honor, we would like to call
Mr. Joseph for another question or two.

O. B. JOSEPH,

a witness for the Defendant, was recalled for fur-
ther cross examination and was examined and testi-
fied as follows:

Cross Examination—(Continued)

By Mr. Hughes:

Q. Mr. Joseph, I believe you said yesterday that
you had been doing business with all of these 25 re-
tailers for some time, and you have a pretty good
idea of their business. I wonder if you could tell
us whether or not their business for 1941 and '42
was practically the same as '43?

A. No, I could not.

Q. More or less, do you have any idea?

A. No, I couldn't tell that.

Q. Would it be more, do you think, or less?

A. I wouldn't have any idea. [110]

Q. In 1942? A. Well, I couldn't say.

(Testimony of O. B. Joseph.)

Q. Well, now, the foremost period from July till—July the 1st to November the 1st, amounted to, in the sale of meats alone—if 10 percent and less was \$19,149.64, then the gross sales in meats during those four months would be \$191,000, wouldn't it, for those four months?

A. Approximately, I think.

Q. In fact, it would be more than that, because some of this was based on seven and even as low as five percent?

A. That is right.

Q. So you feel you could safely say it amounted to two hundred thousand dollars every four months in the period of nineteen—during the year of 1943?

A. Well, whatever those figures would amount to. I don't—

Q. Well, do you have any idea that 1942 was less or more than 1943?

A. Well, I would think that for the same period that it would be more, in 1943.

Q. '43 than '42?

A. Yes.

Q. In other words, if it amounted to two hundred thousand dollars, we will say, for the months of July, August, September and October, 1943, you think it might be a little less for the corresponding period of 1942?

A. I would think so.

Q. Well, now, you could see two hundred thousand dollars for four months would run around six hundred thousand dollars a year, unless it is seasonal. Would you say [111] the sales are more or less in the winter time than the summer?

A. No, I would not say that there is.

(Testimony of O. B. Joseph.)

Q. They run about the same throughout the year?

A. We had unusual conditions at this time.

Q. I say, does it run usually about the same throughout the year?

A. Well, probably in ordinary times we would be doing a little more business in the winter time than we do in the summer, but these were rather unusual conditions.

Q. Well, if—

A. And people were not able to get the meat. May I go ahead?

Q. Yes, pardon.

A. Many of these markets were trying to keep open by handling poultry and fish, and other times they were only open say a day or two a week. They would spend the rest of their time trying to pick up meat to keep their markets open.

Q. But, to get back to the question, if it amounted to two hundred thousand dollars during the summer, of the four months of 1943, then you would say that the total gross sales would be around six hundred thousand dollars for the year, it was that for three months—I mean four months, then it would be three times that for the year, practically? Would you say that?

A. Well, if the business run the same. I couldn't say what it would be.

Q. Well, looking at it from another standpoint, is there any question in your mind that the total sales from the meat markets and the grocery stores

(Testimony of O. B. Joseph.)

exceeded six [112] hundred thousand dollars a year, both?

A. I don't have any idea what the gross sales were.

Q. Well, you know that amounted to a considerable sum. You figure out the number of stores that had the grocery in connection with the meat market.

A. I think they did a pretty good business.

Q. So you could safely say that it amounted to more than six hundred thousand dollars a year during the year 1943, could you, or couldn't you?

A. I couldn't say.

Q. If it amounted to——

The Court: Let me interrupt you. Did you get a percentage on the grocery sales?

A. No, we had nothing to do with the grocery sales. I don't know anything——

The Court: I wanted to be clear on it.

Q. What I am trying to establish, have you any idea—could you give the Court an idea of the amount of business that was done in the sale of meats during the year 1943?

A. For the whole year, no, I could not.

Q. Well, I think you stated that it runs about the same throughout the year. If it amounted——

A. I said under ordinary conditions, but these were not ordinary conditions.

Q. Well, did you sell more during these months, July, August, September and October, 1943, than you did in '42?

(Testimony of O. B. Joseph.)

A. Yes, we increased our kill quite materially.

Q. I see, you sold more meats when it was scarcer—when it was supposed to be scarcer, during those periods? [113]

A. After we had taken over these markets we sold more meat, yes, sir.

Q. So that you don't want to state you don't know or don't care to give any figures as to whether or not the business for 1943—I am speaking now of the total meat business, whether or not it amounted to around six hundred thousand dollars a year?

A. No, I wouldn't say that.

Q. And the same for 1942, you don't know and you haven't any—

A. No, I wouldn't say.

Q. Now, are you familiar with the general method of price control for retail meat markets?

A. Why, I know a little bit about it. I don't follow that.

Q. You have a retail market?

A. We have somebody else that looks after that.

Q. You have a retail market, you say?

A. Yes.

Q. Well, you haven't familiarized yourself with the regulations concerning that?

A. No, I don't pay so very much attention to it. I have a man that doesn't do anything else that looks after that.

Q. Do you know that there are two different sets of prices, depending upon the value of the

(Testimony of O. B. Joseph.)

business done by stores of the type that you claim that you operated during 1943?

A. Well, as I say I am not familiar with that. I don't pay any attention to that part of it.

Q. You don't know that if you operate four more stores as a retailer, that you could not sell at the price that [114] the ordinary retailer sells at?

A. I am not familiar with it.

Q. You are not familiar with it?

A. No, I am not.

Q. Did you instruct your managers to reduce the price to—we will say Group 3 of the regulations, Maximum Price Regulation 336?

A. I think you have a copy of the letter of instructions that we gave them.

Q. That was the only instruction that you gave them?

A. That was all.

Q. Do you know whether or not these stores continued to sell these meats,—the beef, at the same level of prices after July the 1st, 1943, as it sold before that time?

A. No, I did not check on it.

Q. You don't know anything about it?

A. No.

Q. You did not give them any instructions about that?

A. The letter of instructions I gave them, that is the only instructions that I gave them.

Mr. Hughes: I think that is all.

Mr. Agnew: That is all.

The Court: I just wanted to ask you a question

(Testimony of O. B. Joseph.)

I probably should have asked yesterday. In addition to your own store that you had before this arrangement arose and these 25 stores that came within this plan, you had numerous other outlets, I assume, for your product?

A. Oh, yes, we have several hundred customers [115] that we sell to.

The Court: Well, did you step up the sales to your other customers in proportion to what you did in these twenty-five?

A. No, we did not.

The Court: Did you curtail your sales to them in any way?

A. No, we did not. We took care of them just the same as we had been doing before, but on these stores that we took over, we did supply them with more meat.

The Court: Well, by reason of this taking over these stores, did you go out into the market and buy more livestock?

A. Yes, we killed more.

The Court: And you bought at a price that—there was no ceiling fixed on livestock?

A. No.

The Court: You bought at a price that, if you had sold to these 25 stores as independent retailers, your slaughtering activity would have been a loss to you?

A. Yes, it would. This 10 percent may have seemed like a very high and large amount, but I

(Testimony of O. B. Joseph.)

made several checks on it as the cattle that we were buying—the class of cattle put in there, and for instance, I recall one account that paid us a little over a hundred dollars, and I checked up upon the cattle that we furnished to them from the particular lot that we had at net cost, and we netted about \$12.00 for that week.

The Court: Out of the hundred dollars? [116]

A. Out of a little over a hundred dollars we netted about twelve dollars out of it.

The Court: That is all. I just wanted to clear that up.

Mr. Hughes: I think Your Honor asked a question yesterday from which it was—you found I think, that there was 17 of these stores operated were also operating grocery stores.

The Court: Yes.

By Mr. Hughes: (resumed)

Q. Now, I don't know whether you stated or not, the comparative business between the grocery stores and the meat—

A. No, I wouldn't have any idea.

Q. You wouldn't know whether they did a great deal more business than the meat stores, or not?

A. I know this, that the ones that had the groceries were very much pleased to think that they had a market supplied with meat, because it helped their sales of the groceries.

Q. And that is one reason they signed this contract with you, because it helped the sale of groceries?

(Testimony of O. B. Joseph.)

A. And another thing, they were having a very hard time to buy anything, and they would spend more time going down to the street and visiting the other markets, trying to get something, and wasting more time than they could possibly get out of it.

Q. Just a minute. Did you say yesterday that the grocery stores did more business than the meat stores out there, of these 25 retail stores? [117]

A. Did more in the grocery line than they did in the meat line?

Q. Yes.

A. I think they did, yes, sir. I think they are much larger in the groceries.

Q. Based upon that fact then, it would run at least a million dollars a year, wouldn't it?

A. I don't know what the volume is, but I have been around visiting these places and you can observe the amount of business that they are doing, and that is my opinion.

Mr. Hughes: That is all.

Mr. Agnew: That is all.

(Witness excused.)

JOHN B. SHOLLEY,

called as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hughes:

Q. Will you state your name, Mr. Sholley?

A. John B. Sholley.

Q. Will you spell the last name?

A. S-h-o-l-l-e-y.

Q. Mr. Sholley, what is your occupation now?

A. I am the District Price Attorney of the Seattle district office of the Office of Price Administration.

Q. What are your duties, generally, in connection with that [118] position?

A. My duties primarily are the furnishing of regulations and interpretations of various Maximum Price Regulations to other members of our staff and to the members of the general public.

Q. And how long have you been with the O.P.A. in this capacity? A. Since April 23, 1942.

Q. And during that time you have had occasion to study and interpret the different regulations?

A. I have spent most of my time doing that.

Q. I hand you Revised Maximum Price Regulation 169, covering beef. Was that in effect at all times during the year 1943, Mr. Sholley?

A. It was.

Q. And I hand you also, the consideration for the issuance of Amendment No. 26 to that regulation—just a minute, I will have these identified.

(Testimony of John B. Sholley.)

Mr. Hughes: I think you might fasten them together. They go together.

Mr. Smith: Are those just the regulations?

Mr. Hughes: Yes. Well, there is the consideration.

Mr. Agnew: Is this 26?

Mr. Hughes: Yes.

Mr. Agnew: Is the date of passage of that 26 shown on its face?

Mr. Hughes: Yes. I will offer this, if the Court please.

The Court: It will be admitted in evidence.

(Whereupon, copy of Maximum Price Regulation No. 169 was then received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. I hand you Plaintiff's Exhibit 3, M.P.R. 355 and M.P.R. 336, and ask you if those two regulations were in effect at all times during 1942 and '43?

A. They were not in effect at all times during 1942, nor were they in effect during all times in 1943.

Q. Well, just tell the Court when they were effective as applied to this particular case?

A. The regulation in this form, speaking now of Regulation 336, became effective on June 21, 1943. Regulation 355 also became effective in this form on June 21, 1943. May I amplify that statement? These copies that are here in the exhibit are copies published considerably later, containing more

(Testimony of John B. Sholley.)

recent amendments. They are in the nature of compilations. The general scheme of the regulations has been unchanged since the date that I have mentioned.

Q. Does that regulation provide for, or if you will just tell the Court briefly, the requirements in the regulation concerning the operation of retail stores.

A. Each retailer is required to determine what is called his group of stores. That determination is based upon two factors. In the first place, his annual gross volume, and during the period in issue, the four months period during 1943. The determination was based upon the total gross sales in the particular store during the calendar year 1942, including all food commodities sold in the store. [120]

Q. That would include meat and groceries in this particular case?

A. It would. The other factor is whether the store is an independent or a chain store. A chain store is a group of four or more stores, under one ownership. Two sets of ceiling prices are established. The first set applies to groups one and two, which includes all non-chain stores whose annual gross volume in 1942 were less than \$250,000. Group three and four includes all other stores.

I should amplify again. A chain store would be one of group four, whose annual gross sales total more than \$500,000.00.

The ceiling prices established for group one and two are in practically all, if not all—in all instances

(Testimony of John B. Sholley.)

higher than the ceiling prices established for group three and four, stores.

Q. Does the regulation, to get down to fundamentals, provide that in this particular case, if the defendant wished to operate these various retail stores as his own, that he couldn't charge the regular ceiling price charged by the ordinary retailer?

A. You mean group one or two, by an "ordinary retailer"?

Q. Yes, group one and two.

A. If the total annual sales of the various retailers during the year 1942 totalled more than five hundred thousand dollars, and a person becomes the owner of that group, he then would immediately be compelled to reclassify each store into group three and four, and abide by the appropriate ceiling prices [121]

Q. Is that ceiling price less to the customer, or more?

A. It is less.

Q. It is less?

A. In nearly all, if not all, cases.

Q. Now, Mr. Sholley, during July or the latter part of June, or around the 1st of July, in 1943, did you talk at any time to Mr. Smith or Mr. Joseph concerning these leases and contracts of employment that have been referred to here?

A. I can't recall clearly whether I talked to either one of these two gentlemen on this subject or not. I do recall participating at a conference in which this subject was discussed.

(Testimony of John B. Sholley.)

Q. Handing you Plaintiff's Exhibit 1, dated July the 30th, I believe that letter is,—was that letter dictated by you? A. It was.

Q. And was that the result of any conversation with Mr. Smith and Mr. Joseph?

A. Well, it was an outgrowth, I suppose, of a chain of circumstances which started at that conference.

Q. Could you state whether or not Mr. Smith and Mr. Sholley or either one of them—or Mr. Smith and Mr. Joseph or either one of them understood that?

Mr. Agnew: I object to him stating what was understood.

Mr. Hughes: That is all right.

Q. Is there any other comment you wish to make on that letter, Mr. Sholley?

A. Well, that is a rather broad question, Mr. Hughes. [122]

Q. Well, I want the Court to have all the facts, and if you can make any further comment that would clarify it to the Court—just tell us what caused you to write that letter.

A. Well, I can give you the background, if that is what you wish.

Q. Yes, if you will.

A. On July 9, 1943, a conference was held in the local office of the OPA. Mr. Joseph and Mr. Smith were present. Mr. Hartson, our Chief Attorney at that time was present. I was present. Mr. Eddington

(Testimony of John B. Sholley.)
of our price staff was present. The subject of discussion was the proposed leasing arrangements which the James Henry Packing Company at that time were either—had embarked upon or were about to embark upon. Mr. Smith submitted to Mr. Hartson a draft of a lease arrangement, and Mr. Hartson commented adversely upon it, and at the end of the conference my recollection is that Mr. Smith said that he would revise the documents and submit them again. Later that same afternoon, after a rather extended absence from my office, I returned. Mr. Hartson, whose office was adjoining, came in to see me and in his hand he held a copy of two documents, what purported to be a lease and what purported to be a contract of employment, drawn in draft form, representing that the James Henry Packing Company was the lessee in the one instance and the employer in the other instance. Mr. Hartson stated that he had received these documents from Mr. Smith, and requested me to forward them to our San Francisco Regional office for a ruling as to [123] their validity—rather as to whether such transactions as exemplified in the documents would be an evasion of Regulation 169. I agreed to do so, and did despatch the documents that same day.

Thereafter, I received a response from the Regional Office which was to this general effect: each case must be decided on its own facts. It is very dangerous to attempt to look at a draft of a docu-

(Testimony of John B. Sholley.)

ment and say whether or not the transaction is valid.

Within a very short period of time our office received a teletype bulletin from the National Office, which bulletin advised us that the National Office had given this matter very serious study, and had concluded to issue amendments clarifying the evasion clauses of Regulation 169. The general substance of the proposed amendment was outlined.

After receiving this instruction from our National Office, I decided that the proper action to take, on the part of our office, was to immediately advise the James Henry Packing Company that their proposed type of transaction, in the opinion of our National Office was an evasion and that all question would be removed in the very near future by means of what was described as a clarifying amendment. I therefore wrote this letter, a copy of which is the exhibit, and despatched it to Mr. Joseph, and a copy to Mr. Smith.

Q. Did Judge Hartson at any time, indicate to Mr. Smith or Mr. Joseph, that he approved of the lease and the contract of employment?

Mr. Agnew: If Your Honor please, that would [124] be hearsay, and Judge Hartson himself testified on that point. I do not think he could contribute anything to that.

The Court: He may answer, if it was a case where he was present, and——

A. Not in my presence.

(Testimony of John B. Sholley.)

Q. By whom was this letter—this correspondence dictated and handled, Mr. Sholley?

A. You mean the correspondence to which I referred?

Q. Yes. A. It was all dictated by me.

Q. And who had charge of it, as far as determining and interpreting the regulation?

A. Generally speaking, that was my responsibility and duty, subject to Judge Hartson's general supervision.

Q. Now did this amendment in any way change the rule that existed prior thereto, so far as evasion is concerned?

A. Well, that is a question of opinion, Mr. Hughes. Do you want my opinion?

Q. Well, I would be glad—

A. In my opinion it was merely clarifying—

Q. Yes.

A. And did not affect the substantive change.

Mr. Hughes: I think that is all.

The Court: Were you active in writing the next letter that was written about the latter part of August?

Mr. Agnew: That was August 30th.

Mr. Hughes: That is the one by Mr. Stoneman, isn't it? [125]

A. I actually, in person, referred one of the letters written by Mr. Smith or Mr. Joseph which came to my attention—came to my desk, I delivered it to Mr. Stoneman in person and suggested that inasmuch as I had already written this letter of

(Testimony of John B. Sholley.)

July 30th, that I felt that the matter should be transferred to the Enforcement Division from the Price Division.

The Court: And Mr. Stoneman was identified with the Enforcement Division?

A. He was at that time our litigation attorney.

The Court: Now, did you have anything to do with the later communications?

A. Not directly. I did discuss the case with Mr. Stoneman upon two or three occasions.

The Court: Of course the discussions you had with him probably would not be competent, and I would not want it.

A. I did not directly advise him what position to take, nor what steps—

The Court: But I am interested in anything that goes towards establishing willfulness and disregard and avoidance, or anything that establishes good faith, or an effort to honestly comply, and any incidents that bear upon that issue would be of interest to the Court and of value in making a disposition of this case. I want to ask you another question. It is not pertinent to the facts, but it is one that counsel either agree or disagree upon on both sides, and that is, since you have been devoting a great deal of time to the examination of these regulations and likewise the [126] Congressional amendments, is it your contention that the Act as it is now written, when it was re-enacted in June of this year, were these various amendments, insofar

(Testimony of John B. Sholley.)

as penalties are concerned, applies to all pending litigation of a civil nature?

A. Your Honor, I do not think I should speak on that subject. May I explain it this way?

The Court: Well, the Court is perfectly willing to assume the responsibility of termination of that, but I thought perhaps, because both counsel in your trial briefs—

A. Let me say this:

The Court: —mentioned the matter.

A. We have a division of functions in our office. All problems relating to penalties, what types of actions are applicable and when they are applicable—all that aspect of our program is under the supervision and direction of our Enforcement Division. I as a price attorney do not undertake to advise at all on those subjects, and my comments on that point would be, let me say, not particularly weighty, because I have never actually undertaken to study that particular question as falling within my province. I will, if you wish, give my own opinion, based upon a summary reading, without any study or research.

The Court: I think I would like to have that matter cleared up. If counsel are in accord on it then there is no room for any argument. Both of you have made reference of it in your trial briefs that you submitted to the Court, and the Court has re-examined the [127] Act as it was amended and passed, and what I have in mind particularly is sub-division (e) in Section 205, where all the new

(Testimony of John B. Sholley.)

language was written in and substantial and wide discretion is placed in the trial court as against the previous enactment, or original enactment, where discretion was almost excluded.

Have you examined it, Mr. Smith, or Mr. Agnew?

Mr. Agnew: I think Your Honor is referring to the amendment providing if a defendant——

The Court: The amendment reads:

“If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may”——now that is in the old language. Here is the new language: “within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney’s fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine; Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of [128] the regulation, order, or price schedule in question was neither willful nor the result of fail-

(Testimony of John B. Sholley.)

ure to take practicable precautions against the occurrence of the violation." That is all new language.

Mr. Agnew: Yes, Your Honor.

The Court: What I am trying to find out is if counsel on both sides are in accord as to whether it is applicable to a set of facts that arose prior to the enactment of the legislation?

Mr. Smith: There is another provision in the act that makes it applicable to pending cases. I interpret that particular provision to mean that Your Honor has discretion, up to the proviso, there, if the defendant shows it was not willful and every precaution was taken, then Your Honor has no discretion. In other words, it could not be a treble award, but some place else in the act it is made applicable to pending cases. I think I can find it. I think we are in accord it is applicable in this case.

Mr. Layman: We would not contend at this time but what the Court could follow the provisions of the amendment in determining the amount of the damages.

The Court: Even though the incident that gave rise to the action came into being prior to the enactment of the legislation?

Mr. Layman: Yes.

The Court: Very well, that covers that phase of it if it becomes material.

Any cross examination, Mr. Smith?

Mr. Smith: No cross. [129]

(Testimony of John B. Sholley.)

Mr. Hughes: That is all.

The Court: You may step down, Mr. Sholley.

(Witness excused.)

Mr. Hughes: That is the government's case. The government rests.

The Court: Do you have any rebuttal, Mr. Agnew?

Mr. Agnew: No rebuttal.

The Court: How much time do you desire?

Mr. Hughes: Personally, I would just as leave to submit it without argument.

The Court: I think I would like to hear from counsel. Since the burden shifted to the defendant, the defendant will have the advantage of the opening and closing argument, then. I will let you proceed until 12:00 o'clock and then we will—I am assuming about fifty minutes or something like that on a side.

Mr. Agnew: I think an hour would be amply sufficient.

Mr. Hughes: An hour on a side?

Mr. Agnew: Yes. I will try to make it less, but sometimes when you get talking you run into more time than you think.

In arguing any case—law case,—I may be putting the cart a little bit before the horse, but I always like to discuss the matter of what findings of Fact the Court would be willing to sign, by sug-

gesting that then sometimes the conclusions of law follow as a [130] very easy matter, if we get settled upon the facts in this particular case.

I have outlined some eleven findings that are short that the defendant would request Your Honor to make, if Your Honor finds that the facts justify such findings.

The first one we ask—that we will ask the Court to make is that the stipulated facts contained in the stipulation and the supplemental stipulation are true and adopted by reference as the findings of the Court.

The second finding——

The Court: The Court has no objection of course, to make such findings.

Mr. Agnew: Or they could be handled in any way that would be proper to repeat them in the findings in drawing them, but I do not believe that it would be necessary because they are part of the record.

The second finding is that during the period in which the Office of Price Administration had failed to place a ceiling upon livestock, it became impossible or greatly difficult for the defendant to process meats and sell at wholesale except at a loss.

Third, because of the shortage of meats it became impossible for the twenty-five retailers involved as parties to these leases, to continue to operate their meat markets and to obtain meat for them.

Third, that retail price ceilings were such that the parties to the leases and agreement believed there was enough margin for both the wholesaler

and [131] retailer to operate if some legal method could be found whereby a portion of the profits of such retail operation could be shared by the wholesaler—that is the third finding, and I think it is very frank on the situation that existed.

Fourth, we request that the Court find that the parties executed these documents openly and not secretly, for the reasons as set forth in finding number three, but without intent to void or circumvent either the letter or spirit of the law, but with the real intent to comply with the law.

Fifth, that prior to the execution of the documents and on or about the 1st of July, 1943, the parties submitted proposed forms to the Office of Price Administration, and made changes as to such forms so as to eliminate criticized items, and that thereafter the corrected documents were executed by the parties.

The sixth finding: That at the time of the conferences of July 1st and thereafter, although the local Office of Price Administration had no doubt and expressed no doubt of the right of a wholesaler to also own and operate retail markets, said office was in doubt as to the interpretation of the National Office in approving the particular method and form of such operation, and in deciding which method and what form would be treated as a prima facie evasion of either the intent or spirit of the law.

Seventh finding, that on July 30th, the local Office of Price Administration notified the defendant by letter, Exhibit—I haven't got the right number of [132] it here, but Your Honor is familiar with the

exhibit, that the San Francisco office of the Price Administration and the National office had disapproved such a form of operation, and that, quoting the language in the letter, that now it would be treated as an evasion. I underlined the word "now" in that finding; that said letter stated that the operation was disapproved largely because of Paragraph 3 of the employment contract which was quoted verbatim in the letter, which was a provision providing that the manager of the local store received his compensation by taking the net profits of operation after the deduction of 10 per cent from the gross; that said letter also called attention to the fact that a clarifying amendment to the regulation upon this subject matter was soon to be issued by the Administrator, and suggested that the parties have a further conference.

As an eighth finding, that the defendant requested delay as to such further conference because of the absence of the president of the company, and also to await the so-called clarifying amendment.

Nine, that on August 23, Amendment 26 was first called to the attention of the defendant, and that later, on August 30th, a letter constituting Defendant's Exhibit blank—that is the Stoneman letter, was delivered to the defendant; that said letter called attention to the clarifying amendment and demanded recision of the leases and contracts within a reasonable time, quoting the letter, and also requested that the office be kept informed from time to time as to the progress made in such recision; that defendant answered said letter on [133] Sep-

tember 2nd stating that the matter was referred to the legal department of the company for opinion as to the rescision of the contracts.

Now the tenth finding; that the defendant did not take *immediate* to procure rescision of the contracts but instead, modified the contracts on September 24th, so as to attempt to eliminate any receipt by the defendant of a percentage on the retail sales of beef or veal.

Then as an eleventh finding, we ask that the Court find that defendant sought approval of the operation as modified on September 24th, but on failure to obtain such approval from the Office of Price Administration, the defendant procured mutual cancellation and rescision on the twenty-five contracts, effective November 1, 1943.

Now that is the findings that we would request. I do not think any of them are out of line in the least bit with the evidence, so we come to the question of what conclusions of law should be drawn from the matter by the Court.

(Whereupon argument continued.)

The Court: Have you a copy of your proposed findings?

Mr. Agnew: In my writing. I doubt if you can read it. I can have it made up this noon and bring it in after the noon recess.

The Court: I will be glad to have it. I think we will take the intermission now until 1:30.

(Recess.) [134]

1:45 O'Clock P. M.

The Court: Did Mr. Agnew finish his argument?

Mr. Smith: I think he did, Your Honor. I think he concluded.

The Court: Well, I will hear from you then, Mr. Hughes.

Mr. Hughes: If the Court please,—

The Court: I wonder if there is a copy of those proposed findings?

Mr. Smith: We will have one very shortly. They are being transcribed now.

The Court: Well, if you have notes on them I would like for you to discuss those from your point of view, and then follow them, because that is a very practical presentation of an argument.

Mr. Hughes: Yes, I am going to leave the interpretation of 205-(d) to Mr. Layman, who will follow me. I just want to outline the argument here.

(Whereupon argument by respective counsel.)

The Court: This matter is not an easy one of disposition. Like every lawsuit, there are substantial reasons that persuade both the litigant and counsel that they are on the right side.

I might state at the outset that I intend to make a disposition of this case now, though, of course, will make no formal findings and conclusions, and will permit counsel to submit them later, but will state generally what the facts are as I now find them, and the [135] conclusions of law that we draw from them.

I think it is quite appropriate, because of the importance of this case to the defendant as well as to the government, to touch briefly upon what the objectives of this unusual, emergent and drastic legislation were and are. When it was enacted, it was sought to surround it with all sorts of safeguards, because it was such a departure from legislation, affecting as it does the most intimate private affairs of the American citizen, and it was expressly written into the act that it would automatically end at a given time, unless Congress saw fit to renew it. It is purely a legislative enactment that Congress in its wisdom thought was essential for the preservation of the nation in a period of crisis, and some of the cases that have arisen under the act and the regulations turned largely upon the issue as to whether the act was one to prevent inflation solely,—and there is some language from the courts indicating that was the primary purpose, and that fact is doubtless true in the particular cases being considered. The purposes of the act, however, are substantially broader than that of merely preventing inflation. The very first sentence of the act indicates that. “It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war.” Now, this is the broad purpose of the act, and then: “to stabilize prizes and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices.”

After this act had been in effect from the date [136] of its enactment until the date of expiration, as fixed by its own terms, Congress saw fit to extend it, and to modify it, and to alter some of the drastic provisions, but still keep within its framework such parts of it as would make effective the major objectives. Among other things, they wrote new language into the act, conferring somewhat greater discretionary powers upon the courts.

I said at the outset this is a most novel and unusual piece of legislation, and confers tremendous powers that ought only to be exercised by those who are given the responsibility of enforcing them with great circumspection and full knowledge of the effect that mistakes, if they make such, might have.

The courts have been and are even now, denied the right to pass upon a regulation promulgated by an administrative official as to its constitutionality, or as to its effect, and likewise as to the act itself. In fact, some judicial construction has gone so far even in a criminal proceedings to hold that in defense of such criminal action, the accused could not interpose a constitutional question in the lower courts, and there has been set up by Congress in the enactment of this act a special court, to pass upon such questions.

The enforcement of the act has resulted in numerous unusual situations. It has resulted in a great amount of hardship, in some instances completely wiping out some peoples' business and their fortunes, while on the other hand it has made it possible for others to make fortunes. It has led to a new

specie of crime and lawlessness known as "Black Market". [137]

The act provides for both criminal and civil proceedings. In the instant case, the evidence indicates that the government sought first to proceed on the criminal side of the law and secured an indictment. That this indictment was later dismissed is not a matter of concern to this Court in making a disposition of the instant case, nor to pass upon what causes there were that motivated or brought about the dismissal of the indictment. It is enough to say that the evidence introduced in the case at bar would, in the judgment of the Court, not have sustained that degree of willful and unlawful violation of the act to have supported a criminal prosecution or conviction, but that is quite another matter from passing upon the question as to whether or not there was this civil violation.

If these two instruments that are called the "lease" and the "contract of employment" were effective instruments for what they purported to be, then I do not believe there was a violation. The terminology of the lease and of the contract of employment is not at fault. The draftsman of both is to be complimented upon his knowledge of the law involving contracts, both for the leasing of premises and the employment of persons, but we must go farther than a mere superficial examination of the documents themselves.

Here are the undisputed facts of the situation that confronted the defendant company — the James Henry Packing Company, when the law in question

became effective, and the various regulations were put into operation, and particularly M.P.R. 169 was announced and made effective; the defendant, a meat packer, which found the outlet of its [138] product through some two or three hundred customers, I think the evidence disclosed, who were retailers, and in addition to those two or three hundred customers one of their own stores that they owned exclusively—found that by reason of the situation growing out of these regulations and maximum ceiling prices and there being none whatever upon livestock because livestock was considered an agricultural product—it could no longer process and sell certain grades of beef, except at a loss. This created a situation where the packers and the smaller packers, particularly, could not supply the trade and sell their products within the limitations fixed by the regulations—that is, Regulation 169 and others that were pertinent, without suffering a loss, particularly as to certain types and grades of meat. If they could not slaughter and could not sell, then the customers would be lost, and their business and its future were being jeopardized.

This defendant, with advice of able counsel, gave thought and consideration to the regulation without an intent to violate it, but with a desire to comply with it and yet continue to remain in business and make a profit, and the testimony of Mr. Joseph, its manager, was in substance, at least, that that is what gave rise to these leases and these contracts of employment. Had it not been for the

Emergency Price Control Act and the O.P.A. regulations, such an arrangement would never have been thought of, and immediately when they ceased, it is clear to the Court, the arrangement would have been cancelled.

Now let us see for a moment, from all of the facts and circumstances surrounding these transactions, if [139] they were in fact an acquisition such as would make the packing company the real party not only in interest, but in control and possession, and having in addition to the advantages of control and possession, all of the liabilities

I am constrained to find that situation is not supported by the facts here, and my reasons for so finding are that Mr. Joseph testified that out of his two or three hundred customers who were retailers, he selected twenty-five who were strategically located in the city so that they might maintain the business of the packing firm in supplying wholesale meat, and they might have at least that much of an advantage when the war is over and the restrictions were gone. The retailers selected were placed in a decidedly advantageous position over the other two hundred and fifty or two hundred and seventy-five that were not chosen.

While there is no direct evidence, it is only a logical and reasonable inference from the evidence that some representative of the defendant company stated to these retailers in substance that "Your margin of business will be greatly increased, even enough that you can pay a percentage of your gross receipts from your meat market operations, and

still be money ahead and still maintain your customers", therefore, this lease agreement. It is clear to this Court that the lease, insofar as actual possession, control, direction and operation, and the employment contract insofar as directions and orders and management are concerned, were never contemplated as effective instrumentalities for taking over by the defendant company of the various meat markets. Not a thing was done during the whole four-month period to [140] indicate such action. The same operator and owner at the time of the execution of the instruments has continued to be such throughout the whole period of time here involved.

The rentals that were fixed, the Court must find were arbitrarily fixed and were never fixed with any thought of actually being paid, because there is no basis at all to show why the minimum rental should be \$25.00 as indicated by the stipulation in the evidence, and the maximum, \$35.00, when some of the places did a volume of business that went three and four times, according to the evidence, what it did in others. I must hold that neither the lease nor the contract of employment, created what they purported to create on their face, and they were merely the outgrowth of activities on the part of this defendant to meet a situation that confronted it by reason of an uncontrolled maximum price on livestock, and selling its product as a processor under a controlled and maximum price made it difficult to continue processing meat at a profit. It is true the public were not compelled to pay any additional sum or any appreciable additional amount for the meats they bought, but the dealer was com-

pelled to part with a margin of his gross profits ranging from 5% late in these transactions, to 10% at the beginning, and he parted with that by giving it to the defendant. The defendant took such percentage of profits openly and in good faith, not with an intent to commit an offense. When I use the words "good faith" I use it in counterdistinction to the word "willful" and "malicious" and "intentional". He took it to make up the losses that he would sustain if he went out in the open market and bought livestock at the then going price, and it thus becomes a [141] method of indirection, in permitting the defendant to dispose of his processed beef products at a price in excess of the maximum, and therefore, it is a violation.

Under the law that existed prior to the time Congress amended it in July of 1944, this Court would have no discretion but to assess the damages and the penalties. With the amendments and with the provisions in the act as I undertsand it, that even though all of the sales herein involved occurred prior to the date when the act was amended, they are still covered by it, and the issue of good faith, or as to whether or not the act was willful and the result of a failure to make practical precautions against the occurrence of the violation, becomes an issue here, and upon that issue turns the question as to what penalties, if any, should be assessed, and for what period of time.

I have already stated that I think the defendant initiated this novel and unusual procedure for the purpose of self-protection and self-preservation,

and probably the suggestion came from others who were trying to do likewise, but that, of course, does not make it valid. In fact, it only goes to show to this Court how readily, if such undertakings were condoned and judicially approved, there would be a breakdown in the effective enforcement of this price control act.

The situation was, in the mind of this Court, substantially different in October from what it was in July. It cannot only be argued with much force, but I do not hesitate to find as a fact, there was neither a willful violation nor was such violation the result of a failure to take practical precautions against the occurrence of a violation [142] during the month of July.

The defendant through its president and manager, and through its counsel, sought to work out some plan whereby they would not violate the law, and yet be able to carry on their meat processing business at a rate and to a degree sufficient to insure its survival, so I feel in making a disposition of this case that I should divide the whole period of time into lesser periods. The fact that the government has seen fit to aggregate four months and eight days into one action, I do not think, under the broad discretionary powers now given by the act would prohibit me from making segregation of such periods, where the evidence discloses a different situation prevailed. I do this on the ground that on July 30th a letter went forward from O.P.A. officials, as shown in this record, indicating clearly

that the O.P.A. questioned this entire procedure, and at the very least, it should have been a warning. For that reason I think that the overcharge made during the month of July should be measured by the amount thereof, which would be the damage without penalties. It is evident that upon the receipt of that letter there was some condition about Mr. Joseph's health, or something of that nature, that was testified to in this record that caused him to take no immediate action. That would be no excuse whatever in a matter of so vital importance as this is; however the O.P.A. took no action, but by August 30th there was again a letter from them to the defendant which is in the file here and has been admitted in evidence, and which again clearly indicates that the arrangement could not be approved, and that the conduct of the business under this arrangement would be looked upon [143] and taken as an evasion and a violation, and while there is some language by the writer of that letter that there might be further conferences, that is not sufficiently persuasive for me in the exercise of discretion to say it meant that the same practices should continue thereafter indefinitely, however because of the writing of that letter and the negotiations which had taken place wherein the defendant was seeking to take reasonable precautions to avoid becoming subject to damages and penalties, cause me to hold that for the month of August, likewise, they should be liable for the amount of the overcharges.

Now, as to September, October, and such days in November as are involved—in some instances they apparently run up to the 8th of November—from September 1st until the conclusion of these transactions, I find that violations were knowingly made, and were the result of a failure to take practical precautions. All precautions that could have been taken were not taken from September 1st and for that reason the judgment will be the amount of the overcharges plus 50% in addition, whatever that may be, or one and a half times.

Coming to the suggested proposed findings, I have in a general way in announcing through this oral decision, covered a part of them. I do not know whether it would be helpful to counsel to go over them as they have been here submitted, because I shall expect you to submit findings in accord with present pronouncement, if you possibly can work them out agreeably. Otherwise, if you cannot, I will set a date for a hearing to make fromal findings. If you cannot agree as to them, of course the responsibility falls upon [144] the Court itself, but the practice in this jurisdiction and in this state has been to leave the preparation of them very much to counsel, for approval by the Court.

Finding number one as suggested by the defendant here—this might be made, reads: "The Court finds that the facts stipulated in the original stipulation and supplemental stipulation are true and are hereby adopted by reference as findings of the Court". I have no hesitancy in making such a finding.

Now finding two suggested that: "During the period in which the Office of Price Administration failed to place a ceiling upon the livestock, it became impossible for the defendant to process meats and sell at wholesale, except at a loss". I hesitate to make so broad and comprehensive a finding, because the evidence was not sufficient in detail to warrant the Court in finding that issue. I would have no hesitancy in making a finding "During that period of time it became impossible for the defendant to process types of meats."

Mr. Smith: Substitute the word "beef".

The Court: There is a wide distinction between different types of beef. There is a certain high grade beef that they could not profitably process. There is certain low grade beef they could, but I think that should be modified—"certain types of beef", or "certain high grade types of beef."

The third one: "The retail price ceilings were such that the parties to the leases and agreements believed there was enough margin for both the wholesaler and retailer to operate if some legal method could be found—if some certain portion of the profit of the retail operation could [145] be received by the wholesaler". The Court of course cannot make that finding consistent with the oral pronouncement just made. The retail price ceilings were such that if the retailers selling the beef were willing to share the margin with the wholesalers, or with the processors, and the processors could operate in this higher type beef, that is the thought that I have expressed in my oral state-

ment, and because I have had to, and have repudiated both the leases and agreements as effective instrumentalities that created the situation they purport to create.

The next suggested finding is: "The parties executed the leases and the agreements of employment openly, without concealment for the purposes set forth in finding number three, did so without an intent to avoid or circumvent the letter or spirit of the law, but with actual intent to comply with the law." I cannot make such finding.

The next one is: "That prior to the execution of the documents and about July 1st the parties submitted proposed forms to the Office of Price Administration with suggestions for change made by the officers." To that extent I can make that finding. "That the changes were complied with"—that part of the finding would have to be stricken because the testimony is that the suggestion was made that a time limitation—I think it was 30 days, within these lease forms, was objectionable, and they knew that it was objectionable, but there was no testimony that the OPA said if that were changed they would approve it, and I do not want to leave that inference here, so if you want to submit findings as I have suggested, I will consider them.

The next suggestion is: "That at the time of the [146] conference of July 1st, and continuing thereafter until the receipt of the Amendment No. 26, although said local office had no doubt of the right of

the wholesaler to own and operate retail markets, said office was in doubt as to the interpretation of the national office concerning the subject matter, of approving the particular method and form of such operation in deciding which forms would be treated as prima facie evasions in the spirit of the law." I will have to decline to make such finding.

The proposed finding: "That on July 30th, the local Office of Price Administration notified the defendant by letter that the national office had expressed disapproval of the form of operation, and that now such forms would be treated as an evasion; that said letter stated that said disapproval was based upon paragraph three of the employment contract, said letter quoting said paragraph in full, and which paragraph provided that the manager of the outlet would receive his compensation by taking the profit remaining after deducting all costs of operation, of ten per cent; said letter further called attention to the fact that a clarifying amendment would soon be issued by the Administrator, and ended with the suggestion that there be a further conference between the parties." Well, I could not make a finding as comprehensive as that, because the inferences suggested therein are not the inferences that the Court draws from all the facts and circumstances in this case, so I decline to make such finding.

As to the next suggested finding: "Defendant requested delays as to such further conferences because of the absence of the president of the company, and also to await [147] the so-called clarify-

ing amendment." The first part of that states a fact that I have no hesitancy in finding—the absence of the president. I think there was evidence his absence was due in part to illness—I am not so sure, but I cannot find and do not find from the evidence submitted in this case that the amendment was ever represented as being a liberalizing amendment.

The next proposal is: "On August 30th the defendant was notified by letter, and that said letter further demanded defendant procure mutual rescission of the leases within a reasonable time and requested notice from time to time as to the progress made in that regard"—I have no hesitancy in finding in substance at least, what is included in that, because the Court assessed its damages upon that idea.

We then have the proposal: "The defendant answered said letter on September 2nd, stating that the matter has been referred to the legal department of the company for opinion as to the rescission of the contracts. Defendant did not take immediate steps to procure a rescission, but instead, modified the contracts—" I do not think that finding is necessary, and:

Your 11th finding, the substance of that is not in dispute at all. If it is material, it might be submitted. It was not November 1st. The stipulation in the exhibit would indicate it was about November 8th.

Mr. Smith: I think, Your Honor, I am not sure the evidence shows it, but I think the defendant

derived no benefit from any of the leases subsequent to November the 1st.

The Court: If that is true, then these—I am [148] taking these exhibits that were attached to the complaint—take each one of these various places of business up individually and there is a breakdown, and then your stipulation refers to them, and it is stipulated they represent the facts. Now, then, if it is a fact that there is nothing after November 1st,—the exhibits disclose sums following November the 1st.

Mr. Smith: There might have been some receipts, but not for business transacted—

The Court: Some amounts are substantial. One for \$88.00, and one for \$63.00, and another one for \$10.00, and another for \$30.00, and so on, but that is a matter that counsel can work out between them as to—

Mr. Agnew: I have one thought I would like to ask Your Honor about, and that is the matter of penalty during the month of September. The letter of August 30th which is just before September 1st notifies us for the first time about the—what they called their clarifying amendment. They used that language about it, that it was now in effect, and they end the letter stating “We therefore shall require a rescision of these contracts. Please let this office know from time to time what progress you are making.” I think at least some reasonable amount, before penalties are attached in the month of September, should be allowed for this rescision.

The truth is, they did not proceed immediately, and tried to stage an argument, but for——

The Court: The Court of course has relieved you of any penalty in July and any penalty in August.

Mr. Agnew: I thought the same reasoning would justify no penalty in September, to allow us to comply with [149] that letter. They said "We will give you a reasonable time," and a reasonable time I would say, would be the following month to get rid of it, and we would still be without penalty under the way they expressed it—"We expect you within a reasonable time to secure revision of these agreements."

The Court: What have you to say to that?

Mr. Hughes: I would suggest in view of the fact that they had never returned any part of this, that they never intended to comply with that part of it, beginning in September, and I do not think they are entitled to any benefit from that because a little different situation, as Your Honor suggested, might apply after September the 1st, or after August the 30th, and——

The Court: That letter is dated August 30th is it?

Mr. Hughes: August 30th.

The Court: Well, will you let me see that again?

Mr. Agnew: You probably would have—there wasn't any profit, as was demonstrated by our testimony, in addition to this. Whatever profit it was, was approximately 60% income tax charged by the

United States Government, charged already, and I do not believe they would return that part of it.

The Court: The letter is Defendant's Exhibit A-3, and the paragraph pertinent is: "The arrangement thus constitutes an evasion of the ceilings fixed in the regulation and in our view must be terminated.

"A reasonable time will be allowed to effectuate a termination before we proceed with legal action. We [150] shall expect, however, to be kept advised of your program in bringing about recisions."

I am rather persuaded to the view that this letter would seem to indicate that some time should be allowed. I am taking into consideration, too, the warning that was given a month earlier.

Mr. Layman: Isn't that time for taking legal action, rather than fixing damages? It seems to me——

The Court: Doesn't your letter carry the inference as to what was a reasonable time? Under the circumstances, it would appear to the Court that two weeks would have been a reasonable time to have terminated these contracts with such warning, but whether that was done, doesn't the letter carry with it the inference that the OPA would not take any action for a reasonable time and under the circumstances two weeks would be reasonable?

Mr. Layman: I don't think so, Your Honor. We might still have claimed damages, but we might not have brought suit for a period of several weeks. There is no waiver of the right to claim damages noted. We claim clear back to July 1st.

The Court: I think that I shall modify the judgment that I have already suggested, by eliminating any penalties, above the over-charges on the business transacted up until the 15th of September. I fix the 15th of September as the time when penalties are to be assessed.

Mr. Smith: There were twenty-five cases there. That is not a small task.

The Court: But it was all in one city and they could all be seen in one afternoon if the weather was good. [151]

Mr. Smith: Some declined to answer.

Mr. Hughes: I am afraid, Your Honor, this is going to be pretty hard to figure because these payments were made weekly, and during each month, and to cut off in the middle—

The Court: Whatever would constitute the two-week period in September, and if you can agree upon the calculation and the facts in so far as you can, and where you cannot agree, then decide upon some date I can probably come back up here and sign findings of fact and conclusions of law, and the judgment.

Mr. Smith: Your Honor please, at this time I think it is proper to ask Your Honor to look at Section 107-E-1 of the amendment, which permits us, with Your Honor's consent, to attack the validity of the regulation in the Emergency Court of Appeals where it says "within five days after judgment," whether that means today or the day the judgment is formally entered, I am not sure. I want to be sure of it.

The Court—One O—section?

Mr. Smith: Section 107 of the amendment,—
1-A—

Mr. Layman: If the Court please, that is on pages 14 and 15 of the pamphlet I handed to you yesterday, Section 204.

The Court: It is 204 here.

Mr. Layman: 204-E-1. You are referring to the stabilization act.

If the Court please, we would be willing to concede the time would run from the date the formal judgment is entered. [152]

Mr. Smith: I would not be satisfied with that, Your Honor, because that would be something for the Emergency Court to pass upon, upon a showing that we had some excuse for not filing a protest, why I think Your Honor has no discretion but to grant us permission to file this complaint in the Emergency Court of Appeals, and I believe this is the time to secure that consent.

Mr. Layman: If the Court please, if this is going to be considered an application to file now, there are so many questions, we would like to have an argument set for that point.

The Court: I do not think the time could possibly start to run until the formal judgment is entered.

Mr. Smith: Until the formal judgment is entered?

The Court: Yes, because the Court may completely change its judgment, and give consideration to a motion for a new trial, and subject to a change

in viewpoint, this time element could not possibly apply to an oral pronouncement making a disposition of the cause.

Mr. Smith: If that is Your Honor's ruling, that is satisfactory. It is in the record. I just wanted to make sure of it.

The Court: I am not deciding now, because I just had this brought to my attention, that it is either mandatory or discretionary with the courts to permit such an appeal. I do not know—I do not know because I have not had an opportunity—whether the situation in the instant case, whether it brings it within the provisions of this particular enactment in reference to an appeal to the [153] Emergency Price Control Court.

Mr. Smith: Then we will present the application at the time of the presentation of the judgment.

The Court: Yes. Let me ask, for my own information, counsel on both sides who have studied the law and the decisions that cover the instant situation, is it your belief that you could do two things at the same time; that you could take the matter to the Emergency Court of Appeals and at the same time to the Ninth Circuit Court of Appeals?

Mr. Smith: That is the way I read the law. We are not permitted to attack the validity in any other court except the Emergency Court, and we are permitted to appeal this case.

The Court: Is that your view of it?

Mr. Layman: I couldn't say.

Mr. Agnew: I was rather inclined to the view personally that it would operate as a stay, and that

the appeal to the Circuit Court would wait. That is, it would operate as a stay of judgment.

Mr. Layman: No.

The Court: Well of course you have the Rules of Civil Procedure to consider and the time limit fixed therein for appeals.

(Case closed.)

[Endorsed]: Filed May 31, 1945. [154]

[Endorsed]: No. 11089. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. James Henry Packing Company, a corporation, Appellee. James Henry Packing Company, a corporation, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11089

CHESTER BOWLES, Administrator of the Office
of Price Administration on Behalf of the
UNITED STATES OF AMERICA,
Appellant and Cross Appellee,

vs.

JAMES HENRY PACKING COMPANY,
a corporation,
Appellee and Cross Appellant.

STATEMENT OF POINTS TO BE RELIED
UPON

Appellant and Cross Appellee, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points on the Appeal taken by him in this cause, to-wit:

1. The Court below erred in awarding judgment in favor of plaintiff and against defendant for only the excess over the legal maximum of the prices charged by defendant on the sales made prior to September 15, 1943 which are referred to in the Findings of Fact and Conclusions of Law.

2. The Court below erred in awarding judgment in favor of plaintiff for only \$21,726.89.

3. The Court below erred in failing to award judgment in favor of plaintiff for three times the excess over the legal maximum of the prices charged

by defendant on all of the sales referred to in the Findings of Fact and Conclusions of Law whether made before or after September 15, 1943.

GEORGE MONCHARSH

Deputy Administrator for
Enforcement

FLEMING JAMES, JR.

Director, Litigation Division

DAVID LONDON

Chief, Appellate Branch

ALBERT M. DREYER

Attorney

Attorneys for Appellant and
Cross Appellee.

[Endorsed]: Filed August 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE PRINTED

Appellant and Cross Appellee, Chester Bowles, Administrator of the Office of Price Administration, hereby designates the following portions of the record herein to be printed:

1. Plaintiff's Complaint
2. Defendants' Amended Answer
3. Stipulation, dated October 11, 1944, with attached Exhibits
4. Supplemental Stipulation dated November 15, 1944

5. Defendants' Motion to Dismiss
6. Order Denying Motion to Dismiss
7. Findings of Fact and Conclusions of Law
8. Judgment
9. Transcript of Testimony and all Exhibits introduced in evidence.

GEORGE MONCHARSH

Deputy Administrator for
Enforcement

FLEMING JAMES, Jr.

Director, Litigation Division

DAVID LONDON

Chief, Appellate Branch

ALBERT M. DREYER

Attorney

Attorneys for Appellant and Cross Appellee, Chester Bowles, Administrator.

[Endorsed]: Filed Aug. 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE AND CROSS-APPELLANT'S
AMENDED STATEMENT OF POINTS

Following is a statement of the points upon which appellee and cross-appellant intends to rely for a reversal of the judgment entered against it, to-wit:

1. The action was brought without authority from the plaintiff, and defendant's motion to dismiss should have been granted.

2. The leases to the defendant referred to in the pleadings were bona fide and bound the defendant to all legal liabilities and responsibilities of a lessee in possession, and defendant made no sales of beef or veal to its lessors or market managers and, hence, did not evade or violate any provision of the Emergency Price Control Act of 1942 or regulations issued thereunder.

3. In leasing retail markets and distributing inspected and graded beef through them to the public at ceiling prices, the defendant was complying with the Emergency Price Control Act in preventing "hardships to persons engaged in business," and assisting "in adequate production of commodities," and preventing inflation, as such purposes are stated in the preamble of said Price Control Act.

4. In distributing inspected and graded meat to the public through its retail markets at ceiling prices or less, the defendant was assisting law enforcement authorities in eliminating the "black market."

5. Prior to and during the operation of its retail markets, defendant sought advice and guidance from the local office of the plaintiff, and at all such times in good faith endeavored to comply with the Price Control Act and its regulations, and, upon notice from the local office of the plaintiff that it considered defendant's retail market operations forbidden by the Act, requested cancellation of its leases from all lessors and discontinued its operation of the markets.

6. Defendant did not evade or violate the Emer-

on inflation, the prevention of which is the prime agency Price Control Act, as it sold beef to ultimate consumers only at ceiling prices or less, and only the price to ultimate consumers has any bearing purpose of the Price Control Act.

7. Even if the leases are disregarded, and it is assumed that the defendant Packing Company sold meat to its various markets, there was no violation or evasion of Maximum Price Regulation 169 prior to the letter from the local enforcement division of plaintiff dated August 30, 1943 (Defendant's Exhibit A-3) and a reasonable time thereafter, as not until then was the defendant Packing Company furnished with its long requested interpretation of the Regulation, and it was allowed "a reasonable time" to effectuate termination of the leases.

8. Upon securing an interpretation of the Regulation, the defendant Company proceeded with reasonable promptness to comply with the interpretation and did not fail to take practical precautions against the occurrence of a violation, and did not wilfully violate or evade the Regulation.

9. Assuming that the trial court was correct in finding that the defendant Company had evaded or violated the Regulation, its conclusion was erroneous and the judgment rendered excessive, because the judgment was for the total gain of the defendant Company realized by the operation of the retail markets from pork, ham, bacon, lamb, lard and other commodities furnished by the defendant Company, and only the alleged overcharge on beef and veal is involved in the lawsuit, as Regulation

169 applies only to beef and veal; and the trial court arbitrarily and wrongfully treated the entire profit as an overcharge on beef, notwithstanding the supplemental stipulation wherein it was agreed that beef constituted but 57% of all meats delivered to said retail markets.

JAMES HENRY PACKING
COMPANY

Appellee and Cross-Appellant

By ALMON RAY SMITH

HENRY CLAY AGNEW

Its Attorneys.

[Endorsed]: Filed Aug. 13, 1945. Paul P. O'Brien, Clerk.

